1991

Country Oaks Condominium Management v. Lon L. Jones, Timothy E. Carn, Frank Ferrante, A.C. Avery, Lawanna R. Packer, James C. Kaiserman, GTT Investments : Brief of Appellee

Utah Supreme Court

Richard A. Rappaport, William B. Wray; Attorneys for Appellees; Jones, Carn, Avery, and Packer; James C. Kaiserman; Pro Se; Frank Ferrante; Pro Se.
Richard W. Jones; Attorney for Appellant.

BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

COUNTRY OAKS CONDOMINIUM MANAGEMENT COMMITTEE,	)	
Plaintiff and Appellant,	)	Case No. 910103
vs.	)	
LON L. JONES; TIMOTHY E. CARN; FRANK FERRANTE; A.C. AVERY; LAWANNA R. PACKER, Trustee; JAMES C. KAISERMAN; GTT INVESTMENTS, a Utah General Partnership,	)	Priority No. 16
Defendants and Appellees.	)	

BRIEF OF JONES, CARN, AVERY & PACKER APPELLEES

"Appeal from the Second Judicial District Court of Davis County"

Judge Douglas L. Cornaby, Presiding

Mr. Richard W. Jones
Attorney for Appellant
4768 Harrison Boulevard
Ogden, Utah 84403

Mr. Richard A. Rappaport
Mr. William B. Wray, Jr.
Attorney for Appellees
Jones, Carn, Avery & Packer
525 East First South, 5th Floor
P.O. Box 11008
Salt Lake City, Utah 84147

IN THE SUPREME COURT OF THE STATE OF UTAH

COUNTRY OAKS CONDOMINIUM MANAGEMENT COMMITTEE, Plaintiff and Appellant, vs. LON L. JONES; TIMOTHY E. CARN; FRANK FERRANTE; A.C. AVERY; LAWANNA R. PACKER, Trustee; JAMES C. KAISERMAN; GTT INVESTMENTS, a Utah General Partnership, Defendants and Appellees.	)	Case No. 910103 Priority No. 16

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Mr. William B. Wray, Jr.
Attorney for Appellees
Jones, Carn, Avery & Packer
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Lon L. Jones ("Jones"), Timothy E. Carn ("Carn"), A. C. Avery ("Avery") and LaWana R. Packer, Trustee ("Packer"), are appellees ("Appellees").

1. JURISDICTION OF THE UTAH SUPREME COURT

Appellees agree that the Utah Supreme Court has jurisdiction to hear this appeal.

2. ISSUE PRESENTED FOR REVIEW

Appellees believe that the only issue presented for review is whether Appellees are "unit owners" within the meaning of the Declaration of Country Oaks Condominiums. Appellant in its Footnote 1, page 1 of the Brief of Appellant dated May 21, 1991 ("Appellant's Brief"), basically acknowledges this fact. Appellees disagree that the other "issues" listed in Appellant's Brief are truly issues. Rather, they appear to be rhetorical questions which form part of Appellant's argument. In any event, these other "issues" listed in Appellant's brief were not decided by the trial court. Other than the issue cited by Appellees herein, the other "issues" cited by Appellant are not properly before the Court.

With respect to the issue Appellant cites as its issue "2(e)", it should be noted that the Court only granted summary judgment with respect to those defendants who moved for summary judgment. This appeal does not apply to defendants Ferrante, Kaiserman, and GTT Investments.

3. DETERMINATIVE STATUTES AND PROVISIONS OF THE COUNTRY OAKS DECLARATION

1. The term "unit" is defined in the Utah Condominium Ownership Act, Title 57, Section 8, Utah Code Ann., (hereinafter, the "Condominium Act"), in §57-8-3(26), as follows:

> "Unit" means either a separate physical part of the property intended for any type of independent use, including one or more rooms or spaces located in one or more floors or part or parts of floors in a building,... . (Emphasis added).

2. The term "unit owner" is defined in the Condominium Act, in §57-8-4(28), as follows:

> "Unit owner" means the person or persons owning a unit in fee simple and an undivided interest in the fee simple estate of the common areas and facilities in the percentage specified and established in the declaration, ... (Emphasis added).

3. The term "condominium unit" is defined in the Condominium Act, in §57-8-3(8), as follows:

> "Condominium unit" means a unit together with the undivided interest in the common areas and facilities appertaining to that unit. Any reference in this chapter to a condominium unit includes both a physical unit together with its appurtenant undivided interest in the common areas and facilities... . (Emphasis added).

4. The term "condominium" is defined in the Condominium Act, in §57-8-3(6), as follows:

> "Condominium" means the ownership of a single unit in a multi-unit project together with an undivided interest in common in the common areas and facilities of the property. (Emphasis added).

5. The term "building" is defined in the Condominium Act in §57-8-3(2), as follows:

> "Building" means a building, containing units, and comprising a part of the property. (Emphasis added).

6. The term "common areas and facilities" is defined in the Condominium Act, in §57-8-3(3), as follows:

> "Common areas and facilities," unless otherwise provided in the declaration or lawful amendments to the declaration means:
>
> > (a) the land included within the condominium project,.... (Emphasis added).

7. The term "common expenses" is defined in the Condominium Act, in §57-8-3(4), as follows:

> "Common expenses" means:
>
> > (a) all sums lawfully assessed against the unit owners;... . [etc.] (Emphasis added).

8. The term "declarant" is defined in the Condominium Act, in §57-8-3(12), as follows:

> "Declarant" means all persons who executed the declaration or on whose behalf the declaration is executed. ... any successors of the persons referred to in this subsection who come to stand in the same relation to the condominium project as their predecessors also come within this definition. (Emphasis added).

9. The Fourth Supplemental and Amended Declaration of Covenants, Conditions, Restrictions and By-Laws for Country Oaks Condominiums, (hereinafter, the "Fourth Supplemental Declaration") (Addendum, Exhibit "A") dated September 21, 1978 and recorded on October 10, 1978 in Book 731 at page 381 of the Davis County Records, together with the Record of Survey Map recorded on October

2, 1978 in Book 731 at page 378 of the Davis County Records, created Phases 7-2 and 7-3 of County Oaks Condominiums.

The Declarant in the Fourth Supplemental Declaration was Country Oaks Partnership, a Utah Partnership of Rice Family, Inc., N.A. Williams Family Corporation, C.J. Larsen Family Corporation, and Lee E. Burbidge & Associates, Inc.

The Appellees are the successors in interest to the said Declarant.

10. The Fourth Supplemental Declaration on pages 4-5 sets forth the following description of the units:

> C. DESCRIPTION OF UNITS. Each unit shall consist of:
>
> > 1. The space enclosed within the undecorated interior surface of its perimeter walls, floors and ceilings (being in appropriate cases the inner surfaces parallel to the roof plan of the roof rafters, and the projections thereof) projected, where appropriate to form a complete enclosure of space.
> >
> > 2. Any finishing material applied or affixed to the interior surfaces of the perimeter walls, floors, and ceiling, including without limitation paint, lacquer, varnish, wallpaper, tile and paneling.
> >
> > 3. Non-supporting interior walls.
> >
> > 4. Windows and doors in the perimeter walls, whether located within the bounds of a unit or not, but not including any space occupied thereby to the extent located outside the bounds of the units.
> >
> > 5. All utility pipes or lines or systems, and fixtures or appliances connected thereto, servicing a single or connecting a single unit to a main or central utility, whether located within the

> bounds of the unit or not, but not including any space occupied thereby to the extent located outside the bounds of the unit.
>
> 6. Units forming a part of the condominium property or more particularly described in the map, which shows graphically all the particulars of the building;... . (Emphasis added).

11. On Page 4 of the Fourth Supplemental Declaration, the relationship between "units" and the buildings to be constructed in Phase 7-2 and 7-3 of the condominium project are set forth in the following language, under the heading GENERAL DESCRIPTION OF BUILDINGS:

> The total number of units in each building are specified in the survey maps previously recorded.
>
> The number of levels or floors in each such unit is shown in the maps. The buildings consist of wood frame structures, together with an exterior composite of wood and/or brick.
>
> Each unit is designed for use as a single family residence and has exclusive right to use and occupy the garage reserved for each unit as shown in the maps.
>
> All other details involving the respective descriptions and locations of the buildings and a statement of the number of stories, number of units and the principal materials of which each building is or is to be constructed and other like details are set forth in the maps which have been filed of record and incorporated herein by reference. (Emphasis added).

12. The "common areas and facilities" are described in Page 6 of the Fourth Supplemental Declaration, as follows:

> D. DESCRIPTION OF COMMON AREAS AND FACILITIES. The common areas and facilities shall

> consist of all parts of the condominium property except the units. ... . (Emphasis added).

13. The Fourth Supplemental Declaration by its terms on Page 3 thereof incorporated by reference Paragraphs One (1) through and including Thirty-two (32) excepting only Paragraph Three (3) of the original Declaration of Phase One as amended, without change or amendment. The original Declaration of Covenants, Conditions, Restrictions and By-Laws for Country Oaks Condominiums (hereinafter, the "Initial Declaration") (Addendum, Exhibit "B") was dated October 1, 1975, and was recorded on November 5, 1975 in Book 582 at Page 709 of the Davis County Records.

14. The term "unit" is defined in the Initial Declaration, in §2(H) as follows:

> The term "Unit" shall mean that part of the property owned in fee simple for independent use and shall include the elements of the condominium property which are not owned in common with the owners of the other units as shown on the map. (Emphasis added).

15. The term "unit owner" is defined in the Initial Declaration, in §2(I) as follows:

> The term "Unit Owner" shall mean the person or persons owning a unit in fee simple and an undivided interest in the fee simple estate of the common areas and facilities in the percentage specified and established in the declaration." (Emphasis added).

16. The term "common areas and facilities" is defined in the Initial Declaration, in §2(P) as follows:

> The term "common areas and facilities" shall mean and refer to :

> 1. The land described in paragraph 3.A hereof. ...
>
> 2. That portion of the condominium project not specifically included in the respective units as herein defined.
> (Emphasis added).

17. The term "common expenses" is defined in the Initial Declaration, in §2(R) as follows:

> The term "common expenses" shall mean and refer to all expenses [etc.] which are lawfully assessed against the unit owners in accordance with the provisions of the Act, this Declaration, the By-Laws, such rules and regulations pertaining to the condominium project as the association of unit owners or the management committee may from time to time adopt, and such determinations and agreements lawfully made and/or entered into by the management committee. (Emphasis added).

18. The Initial Declaration in §2(S) incorporates the definitions set forth in the Condominium Act, by the following language:

> Those definitions contained in the Act, to the extent they are applicable to and not inconsistent herewith, shall be and hereby are incorporated herein by reference and shall have the same effect as is expressly set forth herein and made a part hereof.

19. In §3(D), the Initial Declaration states as follows:

> The common areas and facilities shall consist of all parts of the condominium property except the units. (Emphasis added).

20. In §4(B), the Initial Declaration states as follows:

> 1. No part of the condominium property shall be used for other than housing and the related common purposes for which the condominium property was designed. Each unit shall be used and occupied as a residence for a

single family and for no other purpose. (Emphasis added).

21. In §24(A), the Initial Declaration states as follows:

> The Declarant anticipates that the condominium project may be expanded to include certain real property described in Appendix D which adjoins the condominium property described in Appendix B hereof.

22. In §24(B), the Initial Declaration states as follows:

> Declarant hereby reserves the right to expand the condominium project to include additional units of the same general type and of comparable quality in construction as the units in the present project, but no other assurances as to architecture, materials or type or size of units are made. The option to expand, as set forth herein, may be exercised by the Declarant, its successors or assigns, without the consent of any unit owners. Such units shall be constructed on the real property described in Appendix D attached hereto, or any portion thereof, subject to applicable zoning provisions of Layton City. The total number of units which may be constructed on said additional property shall not exceed 192 units ... . No assurances are made as to what improvements may be made or required in conjunction with construction of additional units. (Emphasis added).

23. In §24(C), the Initial Declaration states as follows:

> Supplemental Declarations and Supplemental Maps. Such expansion may be accomplished by the filing for record by Declarant in the office of the County Recorder of Davis County, Utah, no later than seven years from the date this Declaration is recorded in said office, a supplement or supplements to this Declaration containing a legal description of the site or sites for new units, together with a supplemental map or maps containing the same information with respect to the new units as was

> required on the original map with respect to the initial units. The expansion may be accomplished in phases by successive supplements or in one supplemental expansion. (Emphasis added, except heading).

4. STATEMENT OF THE CASE

This is a case brought by plaintiff for the foreclosure of condominium area assessments.

5. COURSE OF PROCEEDINGS

Plaintiff commenced this action by filing its Complaint dated October 10, 1989 against defendants. The Complaint among other things alleged that each defendant was obligated to pay common expenses, beginning August 1, 1989.

Defendants and Appellees Jones, Carn and Avery filed on December 12, 1989 an Answer to plaintiff's Complaint. (R. 48). Defendant and Appellee Packer was never personally served with process, and no answer on her behalf appears in the record. See also footnote 1, at page 15, infra.

Thereafter, plaintiff on January 26, 1990 filed a Motion for Summary Judgment against defendants. (R. 54). Defendants Jones, Carn and Avery on February 28, 1990 filed a Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment. (R. 165). On March 21, 1990, the firm of Cohne, Rappaport & Segal, P.C. filed an entry of appearance on behalf of defendant and Appellee Packer, (R. 209), and on the same day filed a Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment on behalf of Packer. (R. 211).

On June 18, 1990, the court, Judge Douglas L. Cornaby, filed its Ruling on Motion for Summary Judgment. (R. 254). The Judge's Order on his ruling was filed on July 9, 1990. (R. 329).

The plaintiff on July 25, 1990 filed a Notice of Filing Interlocutory Appeal, (R. 331), which petition was denied by the Utah Supreme Court on August 16, 1990, filed August 23, 1990. (R. 333.)

On November 26, 1990, plaintiff filed a Motion to Set Aside the Order of the court denying plaintiff's Motion for Summary Judgment. (R. 340). The parties submitted memoranda in support and against said Motion. (R. 351, R. 361). Then as shown by Minute Entry dated January 15, 1991, (R. 382), it was agreed by counsel in telephone conference with Judge Douglas L. Cornaby that defendants' counsel will file a Motion for Summary Judgment, the court's Memorandum Decision (R. 254) will apply and there will be a final Order drawn, the unjust enrichment issue will be reserved by stipulation, and the trial date (theretofore set pursuant to the sole issue of what proportion of common expenses the defendants should pay) (R. 339) will be stricken. The Order denying plaintiff's Motion to vacate the court's Memorandum Decision and Order regarding its Motion for Summary Judgment was filed on January 24, 1991. (R. 383).

Defendants Jones, Carn and Avery's Motion for Summary Judgment was filed on February 8, 1991. (R. 385). Pursuant to stipulation between the parties (R. 387), the court filed its Order on February 8, 1991 granting Appellees' Motion for Summary

Judgment. (R. 390). The Order acknowledged that the issue of unjust enrichment is reserved to each of the parties to bring in a separate action after final ruling on appeal of the Order.

6. DISPOSITION IN LOWER COURT

The plaintiff had made a Motion for Summary Judgment which was denied in a Memorandum Decision. Thereafter, Appellees made a Motion for Summary Judgment. The parties entered into a Stipulation dated February 8, 1991, pursuant to which the plaintiff acknowledged the Court's prior ruling in its Memorandum Decision and agreed that the same resolved the issues in the Appellees' Motion for Summary Judgment and consented to the entry of Appellees' Motion for Summary Judgment. An Order was entered granting Appellee's Motion for Summary Judgment in accordance with the Stipulation.

7. STATEMENT OF FACTS

Country Oaks Condominium was created as an expandable condominium on May 5, 1975. Thereafter, the condominium was expanded. The Fourth Supplemental and Amended Declaration of Covenants, Restrictions and By-Laws for Country Oaks Condominiums was recorded on October 10, 1978. The issues which are the subject of the disputes in this action arise out of the Fourth Supplemental and Amended Declaration.

1. No buildings have been constructed on the property which plaintiff contends are defendants' units. (R. 95, R. 144, R. 156, R. 219).

2. Not only have no buildings been built, there are no roads leading to some of the areas where the purported "units" were to be built. (R. 96).

3. No assessments were made against the alleged "units" between October 10, 1978, when the Fourth Amended Declaration was recorded, and August 1, 1989. (R. 96, R. 118-119, R. 220).

4. Neither plaintiff nor anyone else attempted to charge defendants or their predecessors in interest, including the original declarant, with any common expenses or maintenance fees based upon an allegation that there were "units" for which homeowners fees were due. (See Affidavit of Lon L. Jones, paragraphs 9-10; Affidavit of Robert L. Rice, paragraph 7; First Affidavit of Timothy L. Carn, paragraphs 5-6; Affidavit of A. C. Avery, paragraphs 5-6; Affidavit of LaWana R. Packer, paragraphs 7-8). (R. 96-97, R. 118-119, R. 144-145, R. 156, R. 220).

5. There is no road to or extending in front of some of the purported "units" of defendants' in Phase 7-3, nor is there access to utility connections or landscaping for said purported "units". (Affidavit of Lon L. Jones, paragraph 7). (R. 96).

6. Although Jones, Carn, Avery, and Packer received warranty deeds, their rights are to build condominium units in certain locations. (R. 114, R. 130, R. 162, R. 220).

7. The Appellees never intended to buy "units", nor did their sellers intend to sell "units." Rather, the Appellees intended to purchase the developers' rights to construct buildings including certain condominium units. (See Affidavits of Lon L.

Jones, Timothy E. Carn, A. C. Avery, Robert L. Rice, LaWana R. Packer and the several Assignments of Declarant's Rights, as attached to said Affidavits). (R. 94, R. 117, R. 135, R. 143, R. 155 and R. 218).

8. Appellees have not been sent the Unit Owners Newsletter except in some instances for September and October 1989. (R. 98, R. 146, R. 158, R. 220).

9. The Condominium Declaration shows that "units" were contemplated consistently and ubiquitously throughout the Condominium Declaration, as amended, to be physical, tangible and closed space. (See, for example, page 8 of the Initial Declaration, paragraph C, Description of Units) (Addendum, Exhibit "B").

> Each unit shall consist of:
>
> 1. The space enclosed within the undecorated interior surface of its perimeter walls, floors and ceilings (being in appropriate cases the inner surfaces parallel to the roof plane of the roof rafters, and the projections thereof) projected, where appropriate, to form a complete enclosure of space.
>
> 2. Any finishing material applied or affixed to the interior surfaces of the perimeter walls, floors and ceiling, including without limitation paint, lacquer, varnish, wallpaper, tile and paneling.
>
> 3. Non-supporting interior walls.
>
> 4. Windows and doors in the perimeter walls, whether located within the bounds of a unit or not, but not including any space occupied thereby to the extent located outside the bounds of the units.
>
> 5. All utility pipes or lines or systems, and fixtures or appliances connected thereto, servicing a single unit or connecting a single unit to a main or central utility,

> whether located within the bounds of the unit or not, but not including any space occupied thereby to the extent located outside the bounds of the unit.
>
> 6. Units forming a part of the condominium property are more particularly described in the map, which shows graphically all the particulars of the buildings; . . . . (Emphasis added).

10. The record demonstrates and as affidavits from the buyers and sellers of defendants' alleged "units" indicate, it was the intent of the buyer and seller to assign to the Appellees the right to build buildings which would contain units in the locations indicated on the Fourth Supplemental and Amended Declaration. (e.g. R. 94, R. 114, R. 117, R. 130, R. 135, R. 143, R. 155, R. 162, R. 218, R. 220).

8. SUMMARY OF ARGUMENT

The defendants are not unit owners as that term is defined in the Declaration. Units are described in Section 3(c), "Description of Units," of the Initial Declaration, as follows:

> 1. The space enclosed within the undecorated interior surface of its perimeter walls, floors and ceilings (being in appropriate cases the inner surfaces parallel to the roof plane of the roof rafters, and the projections thereof) projected, where appropriate, to form a complete enclosure of space. (etc.). See also this Brief, §7, paragraph 10; §3 generally, supra.

It is undisputed that there are (a) no buildings, and (b) no enclosed space. The Appellees have the right to construct buildings containing units in certain locations. The Declaration describes that a condominium unit is in fact the interior of an enclosed space. This obvious fact has been recognized by the

plaintiff from 1978 until August 1, 1989. During all of that time, no one has ever thought to treat a right to develop units as meaning that one is in fact a unit owner. In this condominium project certain units have been built. It is the expenses associated with repairing the buildings in which those units are located, the upkeep of the roofs, sidewalks and grounds which the residents of those units use, and the gardening and landscaping, for those units that the Management Committee wants paid for by those (the defendants) who do not own units.

Defendants Jones, Carn and Avery have at all times stated that they are not unit owners. The party who sold to them, Robert Rice, has also filed an Affidavit which is undisputed and indicates that there was no intent for these defendants to own units. Defendants Ferrante, Kaiserman and GTT Investments have basically not participated in the case.[1]

9. ISSUES

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[1] There is a question about LaWana R. Packer, Trustee. LaWana R. Packer had sold the right to develop condominium units via a contract to Kaiserman, et al. Her interest and rights were solely to receive funds, and therefore, she had a personal property right. LaWana R. Packer has opposed the plaintiff's Motion for Summary Judgment (R. 211, Memorandum . . . in Opposition, dated March 20, 1990). Since LaWana R. Packer is not an owner of any interest, but merely entitled to receive payment, she cannot be liable to plaintiff. It should be noted that LaWana R. Packer has never been personally served in this case and that no Answer was filed for LaWana R. Packer. The attorney for plaintiff did mail a copy of the Summons and Complaint to Packer. (R.43). In any event, if LaWana R. Packer needs an Answer (or an amended Answer), she hereby requests leave to file the same. LaWana R. Packer has opposed plaintiff's Motion for Summary Judgment and has filed her own Motion for Summary Judgment which was granted. Since LaWana R. Packer has had independent counsel, she has consistently taken the position that she is not an owner of a unit. Furthermore, this issue of an Answer for LaWana R. Packer was not raised before the trial court. If it had been raised, it would have been an issue that was readily remedial. It should not now be permitted to be raised.

The issue in the case is whether the defendants own "units" as that term is used in the Declaration.

10. ARGUMENT

Introduction. Plaintiff has broken its argument on whether the defendants own units, into 16 different parts. A number of those different parts do not require discussion. Furthermore, those parts do not deal with the key provisions of the Condominium Declaration which describe what a unit is, what the common area is, and the basic definitions upon which the subject case should be decided. Rather than respond to each of the parts, Appellees will first address the key provisions of the Declaration and the Condominium Statute, and then address Section 24 of the Initial Declaration upon which Appellant bases a substantial portion of its argument. Appellee will then touch on some of the minor points raised by Appellant.

A. Key Declaration Provisions.

The Condominium Declaration, as supplemented and amended, is quite clear in distinguishing between units and common areas. Section 2 of the Initial Declaration, which constitutes the definitions section of the Declaration, states in paragraph P, that the term "Common Areas and Facilities" shall

> mean and refer to: 1. The land described in paragraph 3.A hereof. 2. That portion of the condominium project not specifically included in the respective units as herein defined."

Section 3(C). "Description of Units," in the Initial Declaration, and Section (C) on pages 4-5 of the Fourth Supplemental Declaration, state that each unit shall consist of:

> 1. The space enclosed within the undecorated interior surface of its perimeter walls, floors and ceilings (being in appropriate cases the inner surfaces parallel to the roof plan of the roof rafters, and the projections thereof) projected, where appropriate, to form a complete enclosure of space.
>
> 2. Any finishing material applied or affixed to the interior surface of the perimeter walls, floors and ceiling, including without limitation paint, lacquer, varnish, wallpaper, tile and paneling.
>
> 3. Non-supporting interior walls.
>
> 4. Windows and doors in the perimeter walls, whether located within the bounds of a unit or not, but not including any space occupied thereby to the extent located outside the bounds of the units.
>
> 5. All utility pipes or lines or systems, and fixtures or appliances connected thereto, servicing a single unit or connecting a single unit to a main or central utility, whether located within the bounds of the unit or not, but not including any space occupied thereby to the extent located outside the bounds of the unit.
>
> 6. Units forming a part of the condominium property are more particularly described in the map, which shows graphically all the particulars of the buildings; . . . . (Emphasis added).

It is clear that the Declaration states that a unit is "the space enclosed within the undecorated interior surface of its perimeter walls." Land is part of the common area and is not part of a unit. Section 2(P) of the Initial Declaration, page 10, supra; Brief, Section 3(6), supra. Under the Description of Buildings, the Declaration indicates that units are intended to be in buildings. Section 3(11), supra. Further, Section D of the Fourth Supplemental Declaration states, "The common areas and

facilities shall consist of all parts of the condominium property except the units." (Emphasis added). Since "land" is part of the common areas, and the common areas are distinct from the "units", and since there are no buildings or units constructed on what plaintiff claims is defendants' land, it follows that defendants cannot own "units." In summary, the plaintiff's position is in direct contradiction to any reasonable reading of the Declaration.

The term "unit" is defined in paragraph 2(H) of the Initial Declaration and means "that part of the property owned in fee simple for independent use and shall include the elements of the condominium property which are not owned in common with the owners of the other units as shown on the map." Section 3(14), supra. Since the land is clearly part of the common area and is owned by all the unit owners as tenants in common, then defendants cannot be owners of part of that land. Rather, defendants have the right to build buildings which contain units on that land.

Appellees also call the Court's attention to the definitions used in the Condominium Act and in the Declaration which are quoted on pages 2-9 of this Brief. The definitions of unit, building, and common area reflect that a unit is intended to be within buildings which are constructed.

B. Section 24 Supports Appellees' Position.

The plaintiff's main point in its Motion to Set Aside Order, and Memorandum in support, R. 349, R. 351, in which it asked the Court to set aside its prior Order, and plaintiff's main point in this appeal is based upon §24 of the Declaration. The plaintiff

chooses certain sentences in §24 and in some cases, parts of certain sentences to support its argument. (See Appellant's Brief, page 3, partial quote of §24(B)). Section 24(A) indicates that certain real property may be added to the condominium project. Section 24(B), second sentence, in its entirety (rather than in part as quoted on page 3 of Appellant's Brief) states:

> Declarant hereby reserves the right to expand the condominium project to include additional units of the same general type and of comparable quality in construction as the units in the present project, but no other assurances as to architecture, materials or type or size of units are made.

The entire second sentence of paragraph 24(B) reads that units are to be constructed and are to be of certain quality of construction. The second sentence of §24(B) would not lead one to think that a unit is part of the real property which is common area.

The fourth sentence of §24(B) also indicates that units shall be constructed. It states:

> Such units <u>shall be constructed</u> on the real property described in Appendix D attached hereto, or any portion thereof, subject to applicable zoning provisions of Layton City. (Emphasis added).

The full sentence of §24(C) is also helpful for our analysis. Section 24(C) states:

> C. <u>Supplemental Declarations and Supplemental Maps</u>. Such expansion may be accomplished by the filing for record by Declarant in the office of the County Recorder of Davis County, Utah, no later than seven years from the date this Declaration is recorded in said office, a supplement or supplements to this Declaration <u>containing a legal description of the site or sites for new units</u>, together with a supplemental map or maps containing the same

> information with respect to the new units as was required on the original map with respect to the initial units. The expansion may be accomplished in phases by successive supplements or in one supplemental expansion. (Emphasis added, except heading).

Section 24(C) again makes it clear that there is a distinction between the site of a new unit and the new unit itself.

Section 24(E) indicates that new units are subject to the terms and conditions of the Declaration and of a Supplemental Declaration. Section 24(E) does not define units and gives no indication that prior to the construction of a unit, there is a unit that would be subject to those terms and conditions. In any event, it is clear from the remainder of §24 that units have to be constructed and that they do not exist until they have been constructed. The Declaration, when read as a whole, or even §24 read alone in its entirety, makes it apparent that buildings and, therefore, units must exist upon the land before they become subject to the Declaration at the time of recording.

C. Which Parties are Before This Court.

In Section 5 of its Brief, Appellant relies on an unfilled Answer by defendants who have not moved for summary judgment and who are not involved in this appeal, as well as LaWana R. Packer. The circumstances concerning LaWana R. Packer have been dealt with in footnote 1 above. Surely Appellant is not contending that an unfilled Answer by parties who have not participated in this case are in some way binding on the Appellees herein? The Court's Order granted the Motion for Summary Judgment brought by Jones, Carn, Avery and Packer. Obviously the Court was not

granting a Motion for Summary Judgment for parties other than those who filed the Motion. There is, therefore, no reversible error. It should also be noted that counsel for plaintiff approved the Court's Order as to form. R. 390-391. It does not seem fair to say the Court has committed reversible error regarding the form of the Order when the Court signs an Order which has been approved as to form by opposing counsel.

D. The Issue of the Warranty Deeds.

All of the parties to the warranty deeds have filed affidavits evidencing what their intent was with respect to the deeds. The deeds were not intended to convey units since there were no units existing at that time. Rather, the deeds were intended to convey the declarant's right to build a building and units at certain locations. See STATEMENT OF FACTS, paragraphs 7 and 10, supra. Furthermore, all the parties understood and intended that units were not being conveyed, but rather what was being assigned was the right to build. The Utah Supreme Court has held that "parol evidence is admissible to show the purpose and intent of parties to a deed." Bown v. Loveland, 678 P. 2d 1984 (at 297). In that case, the court held that a deed was actually a mortgage as intended for security for a loan. In this case, the testimony of the grantor and grantee are the same. There was not an intent to sell "units" as defined in the Declaration, but rather, it was intended to transfer to the grantee the right to construct buildings containing units. The evidence is clear, unequivocal and uncontradicted.

If units have not been created, then obviously, one cannot create a warranty deed conveying the nonexistent units. The Appellees indicated that they did not consider that there were units which fit within the meaning of the Declaration. The grantor and grantee have executed corrective documents. All of this is undisputed in the record.

It is well established in the law that when a deed is used for a purpose which is different from the parties' intent, the Courts should interpret the document in accordance with the parties' intent.

E. Declarant Can Assign its Right to Build Units.

Plaintiff has raised the issue of what interest defendants have if they do not own units. A review of the third page of the Fourth Supplemental Declaration (see Addendum, Exhibit "A") reflects that the Declarant would both be selling units and further, might be assigning its right to construct units as described to assignees. See, especially, "NOW, THEREFORE" paragraph on said page 3 of Addendum, Exhibit "A":

> And . . . shall be binding upon Declarant, its successors and assigns and any persons acquiring or owning an interest in the real property and improvements, their grantees, successors, heirs, executors, devisees, and assigns.

It is clear from that clause that there is a distinction between Declarant and his assigns and all those who will be buying and owing an interest in the real property and their assigns.

F. Case Discussion.

Appellant asserts in Section XIII of Appellant's Brief that "the "Hyde Park case is good law that should be followed in Utah." Appellees respectfully submit that the Utah courts have never adopted the holding of the Hyde Park[2] case and, in fact, the case has been distinguished, even in Florida.

The Hyde Park case cited by plaintiff is clearly distinguishable. In that case, the appellee had title to certain unimproved lots within a condominium project. The issue was whether appellee's title to the "lots" constituted a title to "units" under the Florida condominium statutes, which statutes are distinctly different from the Utah Condominium Act as to the meaning of units. In that case, lots were independently owned and were not part of the common area. In the present case there is no title to unimproved lots, with all the land being part of the common area by definition. Here, no units had been built.

A subsequent Florida case, Welleby Condominium Assoc. One, Inc. v. The William Lyon Co., 522 So. 2d 35 (Fla. App. 1987) (R. 264) stated (adopting the lower court's Order) (Appendix, Exhibit 3):

> The Court is aware of the most recent case known as Hyde Park Condo v. Estero Island, 486 So. 2d [sic] (Fla. 1st DCA 1986). This case is distinguishable from the present situation in that, the definition of "unit" under the 1969 Condominium Act is different than the definition in force and effect on October 17, 1974. In the Hyde Park case, Supra., the declaration of Condominium provided that assessments would

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[2] Hyde Park Condominium Assoc. v. Estero Island Real Estate, Inc., 486 So.2d 1 (Fla. App. 1986).

> be against units. Units under the 1969 Condominium Act included any part of the condominium property which was subject to private ownership. This broad definition would encompass land, land and improvements, or improvements. Thus, the owner of unimproved property, in that case, was subject to an assessment because, the definitional requirements of the declaration of condominium and the Florida Statutes, at that time, would have defined his raw, unimproved land as a "unit". Such is not the case before this Court, because, the definition of "units" under Florida Statute §711.103(15) [§711.03(15)] permitted a "unit" to be described in any number of different ways. In the present case, the scrivner (sic) of this declaration sought to define a "unit" as a private dwelling, thus exempting from an assessment, raw, unimproved property. Id. at 37-38.

Attached hereto in the Addendum, as Exhibit "C", is a full copy of the opinion in the Welleby case.

The Court in Welleby on appeal affirmed and adopted the findings and conclusions of law of the trial court, which held that the defendant/appellee was not liable for maintenance fees, where the declaration defined "unit" as a private dwelling, and not unimproved property.

The Idaho Court of Appeals has addressed the issue of whether a developer was an owner of units which were contemplated, although not constructed, in Investors Limited of Sun Valley v. Sun Mountain Condominiums, Phase I, Inc. Homeowners Association, 683 P.2d 891, 106 Idaho 855 (Idaho App. 1984). The developer wished to vote on behalf of the eight units not yet constructed so it could have sufficient votes to amend the declaration. The Idaho court rejected the same argument put forth by the plaintiff in this case, stating:

> As explained below, we think the term "owner", as used in the declaration, is unambiguous. A plain reading of the declaration supports the Association's position that "owner" is defined by reference to physically existing units. (Emphasis added). Id. at 893.

In the declaration in question in the Investors Limited case, a unit was defined in the Declaration as follows:

> "Unit" means the separate interest in a condominium as bounded by the interior surface of the perimeter walls, floors, ceilings, windows and doors thereof and the interior surfaces of the built-in fireplaces as shown and numbered on the condominium map to be filed for record, together with all fixtures and improvements therein contained. (Emphasis added). Id. at 894.

The Idaho Court, focusing on the Declaration itself, noted that the Declaration defines "owner" as "any person or entity including Declarant, at any time owning a condominium," and that "condominium" means "a separate interest in a unit..." Id. at 894. The Court then went on to state as follows:

> It is clear from the foregoing provisions that to be an "owner"--and thus a member of the association--one must own a condominium. A condominium does not exist under this declaration unless there is both ownership of a separate interest in real property (a unit) and an undivided interest in real property (the common area of the project). A developer, like anyone else, must have both interests before he is an "owner" within the meaning of the declaration. The declaration treats a "unit" as part of a "building" and refers to "building," in Section 2.4, as one of the buildings constructed on the property. (emphasis original). Id. at 895.

The Court then concluded as follows:

> We conclude that because Investors is not an "owner" of a condominium it is not entitled to membership in the Association. Id. at 895.

Attached hereto in the Addendum, as Exhibit "D" is a full copy of the opinion in the Investors Limited case.

The Investors Limited Court thus defined "owner" of a condominium with reference to physically existing units. One of the components in the Idaho definition of condominium was a separate interest in a "unit," and "unit", as described above, meant the separate interest in a condominium as bounded by the interior surface of the perimeter walls, etc. Id. at 894. Because "unit" was described by reference to walls and other tangible features in a building, and because the buildings which were to house plaintiff's units had not yet been built, there were no such "units" and plaintiff was not deemed by the Investors Limited court to be an "owner" entitled to vote in the Association.

The Investors Limited case is discussed in the recent treatise, Natelson, Law of Property Owners Associations (1989). As stated therein, at page 86:

> [Investors Limited] is interesting largely for its interpretation of the Idaho [condominium] statute. Apparently, a condominium unit cannot exist in Idaho where there are no physical walls to surround that unit's air space. The statutes of many other jurisdictions contain similar provisions, and Investors is probably good law in those jurisdictions.[11]
>
> ---
>
> [footnote 11] Among the other statutes that require enclosure in a building are [Colorado, Oklahoma and Vermont statutes]. Some other statutes do not require that individual air space be limited by the confines of a building. See, e.g. Fla. Stat. Ann. §718.103(23)....

The Idaho condominium statutes and the Utah Condominium Act are similar in their use of and reference to physical improvements as characterizing the existence of "units." The Utah statutory language in relevant part is set forth in the STATEMENT OF FACTS. The relevant and comparable parts of the Idaho statutes, Id. Stat. Ann., are as follows:

> §55-1503(d): "Unit" means the separate interest in a condominium.
>
> §55-1509:. Unless otherwise expressly provided in the declaration, deeds, plat or plats, the incidents of a condominium grant are as follows:
>
> (a) the physical boundaries of the unit are the interior surfaces of the perimeter walls, floors, ceilings, windows and doors thereof, and the unit includes both the portions of the building so described and the air space so encompassed....

The similarity between the Idaho Condominium Statutes and the Utah Condominium Act and Declaration of Condominium as to the essential requirement of physical, tangible improvements is evident. In contrast with the Florida condominium situation, as referenced in the Hyde Park case, a "unit" under the subject condominium declaration in the present case, cannot exist where there are no physical walls to surround that unit's air space. A unit definitely cannot be a parcel of land within the project because all such land is common area.

In the present case, the Appellees have succeeded to the rights of Declarant, in that they have the right to develop condominiums. But until they do so, they will not be liable under

either the Condominium Act or the condominium documents as a unit owner.

Other pertinent facts supporting Appellees' position include the following:

> (i) No assessments were made against the alleged "units" between October 10, 1978, when the Fourth Amended Declaration was recorded, and August 1, 1989. STATEMENT OF FACTS, paragraph 3.
>
> (ii) There is no road to or extending in front of some of the purported "units of defendants in Phase 3, nor is there access to utility connections or landscaping for said purported "units". STATEMENT OF FACTS, paragraph 5.
>
> (iii) Although the defendants Jones, Carn, Avery, and Packer received warranty deeds, the defendants' rights are to build condominium units in certain locations. STATEMENT OF FACTS, paragraphs 6, 10.
>
> (iv) The Appellees never intended to buy "units", nor did their sellers intend to sell "units." Rather, the Appellees intended to purchase the developer's rights to construct buildings enclosing certain condominium units. STATEMENT OF FACTS, paragraph 7.

G. Miscellaneous Points.

1. Plaintiff's Argument VII assumes that the defendants are unit owners. Plaintiff then cites to provisions that would require unit owners to pay association fees. To say the least, plaintiff's Argument VII begs the question.

2. In its Argument VIII, plaintiff discusses the Appellee's offer to pay some reasonable sum to cover expenses incurred by the Association with respect to costs incurred by the Association with respect to the condominiums. The defendants had

offered to pay some reasonable sum in settlement or pursuant to a possible amendment to the pleadings by plaintiff to assert unjust enrichment or some similar remedy. See the Court's Order entered February 8, 1991, R. 390, which is Exhibit "P" to Appellant's Brief. Appellees have not indicated that the condominium documents require that they pay unit owner fees. In fact, the case is obviously pending because the Appellees have taken the opposite position. Offering to resolve the case and offering to pay some sum to avoid further litigation on the issue of unjust enrichment, while clearly maintaining a position that one is not a unit owner and denying the allegations of the Complaint, does not constitute an admission that one is a unit owner.

3. The plaintiff in its Argument X contends "the fact plaintiff's [sic] are in court indicates defendants own units at Country Oaks." (Appellant's Brief, p. 32). Plaintiff's argument appears to be that because they have filed an action alleging that defendants are owners of "units," somehow this makes it so, which clearly it does not. The act of filing the Complaint and filing a lien does not create units where there are none. Appellees respectfully submit that plaintiff's argument is illogical and untenable.

4. Plaintiff's argument in Section XI seems to be that one would be unable to get a construction loan if one didn't have a unit. However, a trust deed would attach to the units when they are in fact constructed, if that was the security which the construction lender intended to have. Furthermore, plaintiff's

concern as to whether a lender would feel comfortable with certain security does not change the clear definition of what is a unit under the Declaration.

5. Appellant's Brief, Section XII asserts that the trial court's ruling invalidates the Declaration. Appellees respectfully submit that the trial court's ruling does not invalidate the Declaration, but merely follows what the parties themselves had been doing for approximately 11 years prior to the Association's "brain storm" to try to assess fees against persons who did not own units. At least with respect to the Fourth Supplemental Declaration which was recorded in 1978, the Association has been able to function, a judge was not required to be a member of the Management Committee, and the Declaration has not been invalidated. The plaintiff's concerns about prospective construction lenders and invalidation of the Declaration did not come to pass during that 11 year period of time. Plaintiff's rhetorical questions cannot overcome the clear language of the Declaration.

6. At Section XVI, plaintiff states, "A unit owner cannot exempt himself from payment of common expenses by waiver or abandonment." Again, plaintiff assumes that Appellees are unit owners. That is the issue for the Court to determine. Plaintiff's argument in Section XVI is not helpful in that determination.

7. Plaintiff's other arguments as stated in Appellant's Brief are similarly without merit or not helpful to the determination of the issue before the Court in this appeal, and should be rejected by this Court.

CONCLUSION

Appellees respectfully request that the trial court's Order be affirmed.

RESPECTFULLY SUBMITTED this 5th day of August, 1991.

Richard A. Rappaport
COHNE, RAPPAPORT & SEGAL
Attorneys for Appellees
Jones, Carn, Avery & Packer

MAILING CERTIFICATE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief of Appellees was mailed, postage fully prepaid, on the 5th day of August, 1991, to the following:

Mr. Richard W. Jones
Attorney for Appellant
4768 Harrison Boulevard
Ogden, Utah 84403

Mr. James C. Kaiserman
601 East Mutton Hollow Drive
Kaysville, Utah 84037

Mr. Frank Ferrante
1451 North 750 East
Kaysville, Utah 84037

(lj/Jones.brf)

A D D E N D U M

THIS WAS recorded at Book 731
page 381

FOURTH SUPPLEMENTAL AND AMENDED DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND BY-LAWS FOR COUNTRY OAKS CONDOMINIUMS

This Fourth Supplemental and Amended Declaration of Covenants, Conditions, Restrictions and Bylaws, hereinafter called "Amended Declaration" is made and executed in Davis County, Utah, this 21 day of September, 1978, by COUNTRY OAKS PARTNERSHIP, a Utah partnership, hereinafter called "Declarant" for itself, its successors, grantees and assigns, pursuant to the provisions of the Utah Condominium Ownership Act, Utah Code Annotated, Section 57-8-1, et seq., (1953 as amended), hereinafter referred to as "Condominium Ownership Act".

W I T N E S S E T H :

WHEREAS, Declarant is the owner of the following described real property situated in Davis County, State of Utah, to-wit:

COUNTRY OAKS

Beginning at a point 776.63 feet East and 72.25 feet South from the North quarter corner, Section 14, Township 4 North, Range 1 West, Salt Lake Base and Meridian, running thence S 83°33'00" East 310.00 feet, thence South 10°00' 00" West 200.00 feet, thence South 74°00'00" West 260.86 feet, thence South 16°00'00" East 107.00 feet, thence South 74°00'00" West 36.71 feet, thence North 27°00'00" West 70.42 feet, thence North 11°00'00" West 145.87 feet, thence North 11°30'54" East 215.22 feet to the point of beginning. (Known as Phase 7-1).

Beginning at a point 776.63 feet East and 72.25 feet from the North 1/4 corner of Section 14, Township 4 North, Range 1 West, Salt Lake Base and Meridian, running thence North 83°33'00" West 200.00 feet thence South 80°40'00" West 160.00 feet, thence South 36°00'00" West 240.00 feet, thence South 279.66 feet, thence South 88°02'57" East 210.06 feet, thence North 11°00'00" West 110.00 feet, thence North 79°00'00" East 92.44 feet, thence North 11°00'00" West 112.00 feet, thence North 79°00'00" East 200.00 feet and thence North 11°30'54" East 215.22 feet. (Known as Phase 7-2).

Beginning at a point 540.00 South 0°10'00" West along the quarter section line from the North 1/4 corner, Section 14, Township 4 North, Range 1 West, Salt Lake Base and Meridian, continuing along said quarter section line 250.19 feet to the North of Lot 218, Country Oaks Subdivision No. 2., thence South 66°00'00" East 105.99 along said North of Lot 218, thence South 72°30'00" East 34.81 feet, said point being 843.77 feet South and 127.72 feet East from said North quarter of Section 14, thence North 13°00'00" East 155.25 feet, thence North 89°00' East 443.54 feet, thence North 11°00'00" West 36.07 feet, thence North 79°00'00" East 30.00 feet, thence North 11°00'00" West 92.00 feet, thence South 79°00'00" West 120.64 feet, thence North 11°00'00" West 20.00 feet, thence North 88°02'57" West 490.74 feet to the point of beginning. (Known as Phase 7-3).

and

WHEREAS, the aforesaid property consists of the land above described together with certain residential buildings and certain other improvements heretofore or hereafter to be constructed upon said premises; and

WHEREAS, Declarant has constructed or will construct residential buildings and other improvements upon the aforesaid premises in accordance with the plans and drawings set forth in the record of survey maps filed heretofore consisting of Three (3) sheets prepared and certified by O. NEIL SMITH, a duly registered Utah Land Surveyor, recorded as Entry No. _____, on _____, 19___, in Book _____, at Page _____, Records, Davis County Recor and

WHEREAS, Declarant desires by filing this Amended Declaration and the aforesaid record of survey map, to submit the above-described real property and the said buildings and other improvements being constructed or to be constructed thereon to the provisions of the Utah Condominium Ownership Act as a condominium project known as COUNTRY OAKS CONDOMINIUM; and

WHEREAS, Declarant desires and intends to sell the fee title to the individual units contained in said condominium project, together with an undivided ownership interest in the common areas and facilities appurtenant thereto, to various purchasers, subject to the covenants, conditions and restrictions herein reserved to be kept and observed; and

WHEREAS, Declarant desires and intends by filing this Amended Declaration and the record of survey map to submit the property to the provisions of the aforesaid act as a condominium property and to impose upon said property mutually beneficial restrictions under a general plan of improvement for the benefit of said property and the owners thereof; and

WHEREAS, the Declarant intends to continue to develop the above condominium project in phases, the first, second, third, fourth, fifth and sixth phases previously being developed and consisting of eight units, ten units, eight units, three units, nine

units and five units, respectively, and made a part of the land previously dedicated to the COUNTRY OAKS CONDOMINIUM project;

NOW, THEREFORE, for such purposes, Declarant hereby makes the following Declaration and declares that all of the property is held and shall be held, conveyed, hypothecated, encumbered leased, rented, used, occupied and improved subject to the following covenants, conditions, restrictions, uses, limitations and obligations, all of which are declared and agreed to be in furtherance of the plan for the improvement of the said property and the division thereof into condominiums, and shall be deemed to run with the land and shall be binding upon Declarant, its successors and assigns, and any person acquiring or owning an interest in the real property and improvements, their grantees, successors, heirs, executors, administrators, devisees, and assigns:

1. Paragraphs One (1) through and including Thirty-two (32) excepting only Paragraph Three (3) of the original Declaration of Phase One as amended are adopted herein by reference and made a part hereof without change or amendment.

2. Paragraph Three (3) "Description of Property" of the original Declaration of Phase One and Paragraph Two (2) of the Supplemental and Amended Declaration of Covenants, Conditions, Restrictions and Bylaws for COUNTRY OAKS CONDOMINIUMS recorded _____, 19___, in Book _____, Page _____ of records of Davis County, are hereby amended to read as follows:

A. DESCRIPTION OF LAND. The land on which the COUNTRY OAKS CONDOMINIUMS are located is that tract or parcel of land in Davi County, State of Utah, more particularly described in Appendix A of this Third Amended Declaration, together with those tracts of land described in Appendix A of this Declaration which are incorporated into and become subject to the provisions of this Declaration as provided herein known as Phase One, Phase Two, Phase Three, Phase Four, Phase Five, Phase Six, Phase Seven-1, Phase Seven-2 and Phase Seven-3 Also, the following described real property is included herein as additional common area, initially for use as a recreational vehicle storage and associated use area:

Beginning at a point located 843.17 feet South and 127.72 feet East of the North quarter corner of Section 14, Township 4 North, Range 1 West, Salt Lake Base and Meridian, running thence South 72°30' East 248.81 feet along the North line of Country Oaks Subdivision, Phase ___; thence North 230.00 feet along the West line of said Subdivision thence South 89° West 203.54 feet, South 13° West 155.25 feet to the point of beginning.

B. GENERAL DESCRIPTION OF BUILDINGS. The buildings constituting a part of this condominium project are thirty-seven in number and are identified in relationship to each other in the survey maps previously recorded and made a part hereof. Two of said buildings are in Phase One, five of said buildings are in Phase Two, two of said buildings are in Phase Three, one of said buildings in Phase Four, four of said buildings are in Phase Five, two of said buildings are in Phase Six, four of said buildings are in Phase Seven-1; Ten of said buildings are in Phase Seven-2 and Seven of said buildings are in Phase Seven-3 of the condominium project.

The total number of units in each building are specified in the survey maps previously recorded.

The number of levels or floors in each such unit is shown in the maps. The buildings consist of wood frame structures, together with an exterior composit of wood and/or brick.

Each unit is designed for use as a single family residence and has exclusive right to use and occupy the garage reserved for each unit as shown in the maps.

All other details involving the respective descriptions and locations of the buildings and a statement of the number of stories, number of units and the principal materials of which each building is or is to be constructed and other like details are set forth in the maps which have been filed of record and incorporated herein by reference.

C. DESCRIPTION OF UNITS. Each unit shall consist of:

1. The space enclosed within the undecorated interior surface of its perimeter walls, floors and ceilings (being in appropriate cases the inner surfaces parallel to the roof plan of the roof rafters, and the projections thereof) projected, where appropriate to form a complete enclosure of space.

2. Any finishing material applied or affixed to the interior surfaces of the perimeter walls, floors, and ceiling, including without limitation paint, lacquer, varnish, wallpaper, tile and paneling.

3. Non-supporting interior walls.

4. Windows and doors in the perimeter walls, whether located within the bounds of a unit or not, but not including any space occupied thereby to the extent located outside the bounds of the units.

5. All utility pipes or lines or systems, and fixtures or appliances connected thereto, servicing a single or connecting a single unit to a main or central utility, whether located within the bounds of the unit or not, but not including any space occupied thereby to the extent located outside the bounds of the unit.

6. Units forming a part of the condominium property are more particularly described in the map, which shows graphically all the particulars of the buildings; without limiting the generality of the foregoing, the unit designations are set forth in Appendix B attached hereto.

7. Each unit has immediate access to the common areas or facilities or limited common areas and facilities contiguous to the building in which such unit is located.

8. Every contract for the sale of a unit and every other instrument affecting title to the unit may describe that unit by its identifying number or symbol as designated in the map or maps with the appropriate reference to the map(s) and to the Declaration, as each shall appear on the records of the County Recorder of Davis County, Utah.

Such description will be construed to describe the Unit, together with the appurtenant undivided interest in the common areas and facilities, and to incorporate all the right incident to ownership of a unit and all the limitations on such ownership as described in this Declaration, including all appurtenant undivided interests and all rights and limitations arising as a result of an expansion

of the project pursuant to Paragraph Twenty-four (24) of this Declaration.

D. DESCRIPTION OF COMMON AREAS AND FACILITIES. The common areas and facilities shall consist of all parts of the condominium property except the units. Without limiting the generality of the foregoing, the common areas and facilities shall include the following, whether located within the bounds of a unit or not:

1. All structural parts of the building, including without limitation foundations, columns, joists, beams, supports, supporting walls, floors, ceiling and roofs.

2. Patios, yards, courts and driveways which are not limited common areas and facilities as defined herein.

3. The roadways contained therein, provided that such roadways shall cease to be part of the common areas and facilities, when and if dedicated to public use with the consent of the association of unit owners and accepted by the public authority having jurisdiction.

4. Any utility pipe or line or system servicing more than a single unit, and all ducts, wires, conduits and other accessories used therewith, but excluding any pipe or line or system or to a pipe or line or system servicing more than a single unit.

5. All other parts of the condominium property necessary or convenient to its existence, maintenance and safety, or normally in common use, or which have been designated as common areas and facilities in the drawings, including recreational vehicle storage areas.

6. The limited common areas and facilities hereinafter described.

7. All repairs and replacements of any of the foregoing.

E. DESCRIPTION OF LIMITED COMMON AREAS AND FACILITIES. Each unit owner is hereby granted an irrevocable license to use and occupy the limited common areas and facilities reserved exclusively for the use of his unit, which shall consist of all the common areas and facilities, including but not limited to a balcony and/or patio, yard and a garage and driveway which are intended for the exclusive

service of the unit, the use and occupancy of which shall in each case be limited to such unit.

3. Appendix B of the original Declaration is supplemented and amended to include the addition of Phase Six to the condominium project as set forth herein and in Appendix A and Appendix B attached hereto and made a part hereof.

4. The common areas and facilities of Phase One, Two, Three, Four, Five, Six, Seven-1, Seven-2 and Seven-3 include the common areas and facilities of Phases One, Two, Three, Four, Five, Six, Seven-1, Seven-2, and Seven-3, include the limited common areas and facilities of Phases One, Two, Three, Four, Five, Six, Seven-1, Seven-2, and Seven-3, with the uses and restrictions thereto appertaining. Phases One, Two, Three, Four, Five, Six, Seven-1, Seven-2, Seven-3, and recreational vehicle storage area, shall be one condominium project.

5. This Supplemental and Amended Declaration shall take effect upon recording.

IN WITNESS WHEREOF, the undersigned, partners of COUNTRY OAKS PARTNERSHIP, the owner of the land described in Appendix A of this Declaration, have set their hands this 21 day of Sept., 1978.

COUNTRY OAKS PARTNERSHIP

Rice Family, Inc.

By _____
Its _____

N. A. Williams Family Corporation

By _____
Its _____

C. J. Larsen Family Corporation

By _____
Its _____

Lee E. Burbidge & Associates, Inc.

By _____
Its _____

STATE OF UTAH)
) ss.
County of Salt Lake)

On the 21st day of September, 1978, personally appeared before me _____, who being by me duly sworn did say that he is the _____ of Rice Family Inc., a General Partnership of Country Partnership, and that this Declaration

was signed in behalf of said Rice Family, Inc., by authority of its Bylaws, and said _____ acknowledged to me that said corporation executed the same.

_____

NOTARY PUBLIC

Residing at: _____

My Commission Expires: _____

STATE OF UTAH)
) ss.
County of Salt Lake)

On the ____ day of _____, 1978, personally appeared before me _____, who being by me duly sworn did say that he is the _____ of N. A. Williams Family Corporation, a General Partner of Country Oaks Partnership, and that this Declaration was signed in behalf of said N. A. Williams Family Corporation, by authority of its Bylaws, and said _____, acknowledged to me that said corporation executed the same.

_____

NOTARY PUBLIC
Residing at _____

My Commission Expires: _____

STATE OF UTAH)
) ss.
County of Salt Lake)

On the ____ day of _____, 1978, personally appeared before me _____, who being by me duly sworn did say that he is the _____ of C. J. Larsen Family Corporation, a General Partner of Country Oaks Partnership and that this Declaration was signed in behalf of said C. J. Larsen Family Corporation, by authority of its Bylaws, and said _____, acknowledged to me that said corporation executed the same.

_____

NOTARY PUBLIC
Residing at _____

My Commission Expires:

STATE OF UTAH)
) ss.
County of Salt Lake)

On the 2nd day of September, 1978, personally appeared before me Lee E. Burbidge, who being by me duly sworn did say that he is the Pres of Lee E. Burbidge & Associates, Inc., a General Partner of Country Oaks Partnership, and that this Declaration was signed in behalf of said Lee E. Burbidge & Associated, Inc., by authority of its Bylaws, and said Lee E. Burbidge, acknowledged to me that said corporation executed the same.

NOTARY PUBLIC
Residing at: Provo, Salt Lake

My Commission Expires:
1-10-82

Phase I

WHEN RECORDED, RETURN
TITLE INSURANCE AGENCY
80 West Broadway
Salt Lake City, Utah

DOCUMENT #1

DECLARATION OF COVENANTS, CONDITIONS,

RESTRICTIONS AND BY-LAWS

709

422434

FOR

COUNTRY OAKS CONDOMINIUMS

Recorded at request of Title Insurance Agency
Date NOV 5 1975 at 2:16 P.M. MARGUERITE S. ROUNDS Recorder, Davis County
By Shaelene Lauritzen Deputy Book 422 Page 709

Indexed
Abstracted
Entered
Filed
Compared

This Declaration of Covenants, Conditions and Restrictions, hereinafter called "Declaration", and the By-Laws which are attached hereto and made a part hereof are made and executed in Davis County, Utah, this 1st day of October, 1975, by Country Oaks Partnership, a Utah partnership, hereinafter called "Declarant", for itself, its successors, grantees and assigns, pursuant to the provisiosn of the Utah Condominium Ownership Act, Utah Code Annotated, §57-8-1, et seq., (1953 as amended), hereinafter referred to as "Condominium Ownership Act".

W I T N E S S E T H :

WHEREAS, Declarant is the owner of certain land located in Davis County, Utah, hereinafter referred to as the "Land" and more particularly described in Appendix A of this Declaration, which is attached hereto and made a part hereof; and

WHEREAS, the aforesaid property consists of the land above described, together with certain residential buildings and certain other improvements heretofore or hereafter to be constructed upon said premises; and

WHEREAS, Declarant has constructed or will construct residential buildings and other improvements upon the aforesaid premises in accordance with the plans and drawings set forth in the Record of Survey Map filed concurrently herewith, consisting of 5 sheets, prepared and certified by George Z. Aposhian, a duly registered Utah Land Surveyor; and

EXHIBIT "B"

WHEREAS, Declarant desires by filing this Declaration and the aforesaid Record of Survey Map, to submit the abovedescribed real property and the said buildings and other improvements being constructed or to be constructed thereon to the provisions of the Utah Condominium Ownership Act as a condominium project known as Country Oaks Condominiums; and

WHEREAS, Declarant desires and intends to sell the fee title to the individual units contained in said condominium project, together with an undivided ownership interest in the common areas and facilities appurtenant thereto, to various purchasers, subject to the covenants, conditions and restrictions herein reserved to be kept and observed; and

WHEREAS, Declarant desires and intends by filing this Declaration and the Record of Survey Map to submit the property to the provisions of the aforesaid act as a condominium property and to impose upon said property mutually beneficial restrictions under a general plan of improvement for the benefit of said property and the owners thereof; and

WHEREAS, the Declarant intends to develop the above condominium project in phases, with the first phase consisting of 8 units and the subsequent phases to be built on land contiguous with and adjacent to the land included in the first phase, consisting of no more than 192 additional units, for a total of no more than 200 units, and it is Declarant's intent to subject the additional property and units as so developed into the Country Oaks Condominium Project by the filing of an amendment to the Declaration, or filing such supplemental declarations as are necessary to accomplish that purpose;

NOW, THEREFORE, for such purposes, Declarant hereby makes the following Declaration and declares that all of the property is held and shall be held, conveyed, hypothecated, encumbered, leased, rented, used, occupied and improved subject to the following covenants, conditions, restrictions, uses, limitations and obligations, all of which are declared and agreed to be in furtherance of a plan for the improvement of said property and the division thereof into condominiums, and shall be deemed to run with the land and shall be binding upon Declarant, its successors and assigns, and any person acquiring or owning an interest in the real property and improvements, their grantees, successors, heirs, executors, administrators, devisees and assigns:

1. NAME OF THE CONDOMINIUM PROPERTY.

The name by which the condominium property shall be known is "Country Oaks Condominiums".

2. DEFINITIONS.

The terms used herein shall have the meaning stated in the Utah Condominium Ownership Act and as follows, unless the context clearly indicates a different meaning therefor:

A. "Declarant" shall mean Country Oaks Partnership, a Utah partnership, which has made and executed this Declaration.

B. The term "The Act" shall mean and refer to the Utah Condominium Ownership Act, Utah Code Annotated, §57-8-1, et seq. (1953 as amended).

C. The term "Condominium" shall mean and refer to the ownership of a single unit in this condominium project, together with an undivided interest in common areas and facilities of the property.

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D. The term "Declaration" shall mean this instrument by which the Country Oaks Condominiums are established.

E. The term "property" shall mean and include the land, the buildings, all improvements and structures thereon, all easements, rights and appurtenances belonging thereto, and all articles of personal property intended for use in connection therewith.

F. The term "condominium project" shall mean and refer to the entire real estate condominium project referred to in this Declaration.

G. The term "map" shall mean and refer to the record of survey map of Country Oaks Condominiums, recorded herewith by Declarant in accordance with Utah Code Annotated, §57-8-13 (1953 as amended).

H. The term "unit" shall mean that part of the property owned in fee simple for independent use and shall include the elements of the condominium property which are not owned in common with the owners of other units as shown on the map.

I. The term "unit owner" shall mean the person or persons owning a unit in fee simple and an undivided interest in the fee simple estate of the common areas and facilities in the percentage specified and established in the Declaration.

J. The term "unit owners" shall mean and refer to unit owners of the Country Oaks Condominums, and of the future phases which Declarant may develop, and include the original purchasers and others who may subsequently become unit owners.

K. The term "association of unit owners" shall mean and refer to all of the unit owners acting as a group

in accordance with the Act, the Declaration and By-Laws.

L. The term "unit number" shall mean and refer to the number designating the unit in the Declaration and in the record of survey map.

M. The terms "majority" or "majority of the unit owners" shall mean the owners of more than 50 percent in the aggregate in interest of the undivided ownership of the common areas and facilities.

N. The term "management committee" shall mean and refer to a committee composed of persons duly elected thereto by the association of unit owners, as provided in this Declaration, and future phases as may be developed by Declarant, in accordance with the By-Laws attached hereto as Appendix C. Said committee is charged with and shall have the responsibility and authority to make and to enforce all of the reasonable rules and regulations covering the operation and maintenance of the property.

O. The term "manager" shall mean and refer to the person, persons or corporation selected by the management committee to manage the affairs of the condominium project.

P. The term "common areas and facilities" shall mean and refer to:

1. The land described in paragraph 3.A hereof.

2. That portion of the condominium project not specifically included in the respective units as herein defined.

3. All foundations, columns, girders, beams, supports, main walls, roof, exterior walkways, parking areas, service streets, stalls and social center,

recreational areas and facilities, yards, gardens, fences, all installations of power, light and other utilities to the outlets, and in general all other apparatus, installations and other parts of the property necessary or convenient to the existence, maintenance and safety of the common area, or normally in common use.

4. Those common areas and facilities specifically set forth and designated as such in the map.

5. All common areas and facilities as defined in the Act, whether or not expressly listed herein, except that portion of the condominium project included in the respective units.

Q. The term "limited common areas and facilities" shall mean and refer to those common areas and facilities designated in the Declaration and the map as reserved for use of a certain unit or units to the exclusion of the other units, including but not limited to balconies, patios and parking spaces designated in the map.

R. The term "common expenses" shall mean and refer to all expenses of administration, maintenance, repair or replacement of the common areas and facilities; to all items, things and sums described in the Act which are lawfully assessed against the unit owners in accordance with the provisions of the Act, this Declaration, the By-Laws, such rules and regulations pertaining to the condominium project as the association of unit owners or the management committee may from time to time adopt, and such determinations and agreements lawfully made and/or entered into by the management committee.

S. Those definitions contained in the Act, to the extent they are applicable to and not inconsistent herewith, shall be and hereby are incorporated herein by reference and shall have the same effect as is expressly set forth herein and made a part hereof.

3. DESCRIPTION OF PROPERTY.

A. Description of Land. The land on which the Country Oaks Condominiums are located is that tract or parcel of land in Davis County, State of Utah, more particularly described in Appendix A of this Declaration, together with those tracts of land described in Appendix D of this Declaration which are incorporated into and become subject to the provisions of this Declaration as provided herein.

B. General Description of Buildings. The buildings constituting a part of this condominium project are three in number and are identified in relationship to each other in the map.

The total number of units in each building and the number of bedrooms which each unit contains are specified in Appendix B which is attached hereto.

The number of levels or floors in each such unit is shown in the map. All buildings will consist of wood frame structures, together with an exterior composite of brick.

Each unit is designed for use as a single-family residence, and has the exclusive right to use and occupy the garage reserved for each unit as shown in the map.

All other details involving the respective descriptions and locations of the buildings and a statement of the number of stories, number of units and the principal materials of which each building is or is to be constructed

and other like details are set forth in the map which is simultaneously filed of record and incorporated herein by reference.

C. Description of Units. Each unit shall consist of:

1. The space enclosed within the undecorated interior surface of its perimeter walls, floors and ceilings (being in appropriate cases the inner surfaces parallel to the roof plane of the roof rafters, and the projections thereof) projected, where appropriate, to form a complete enclosure of space.

2. Any finishing material applied or affixed to the interior surfaces of the perimeter walls, floors and ceiling, including without limitation paint, lacquer, varnish, wallpaper, tile and paneling.

3. Non-supporting interior walls.

4. Windows and doors in the perimeter walls, whether located within the bounds of a unit or not, but not including any space occupied thereby to the extent located outside the bourds of the units.

5. All utility pipes or lines or systems, and fixtures or appliances connected thereto, servicing a single unit or connecting a single unit to a main or central utility, whether located within the bounds of the unit or not, but not including any space occupied thereby to the extent located outside the bounds of the unit.

6. Units forming a part of the condominium property are more particularly described in the map, which shows graphically all the particulars of the buildings; without limiting the generality of the foregoing, the unit designations,

location and number of bedrooms are set forth in Appendix B attached hereto.

7. Each unit has immediate access to the common areas or facilities or limited common areas and facilities contiguous to the building in which such unit is located.

8. Every contract for the sale of a unit and every other instrument affecting title to a unit may describe that unit by its identifying number or symbol as designated in the map or maps with the appropriate reference to the map(s) and to the Declaration, as each shall appear on the records of the County Recorder of Davis County, Utah. Such description will be construed to describe the unit, together with the appurtenant undivided interest in the common areas and facilities, and to incorporate all the rights incident to ownership of a unit and all the limitations on such ownership as described in this Declaration, including all appurtenant undivided interests and all rights and limitations arising as a result of an expansion of the project pursuant to paragraph 24 of this Declaration.

D. Description of Common Areas and Facilities. The common areas and facilities shall consist of all parts of the condominium property except the units. Without limiting the generality of the foregoing, the common areas and facilities shall include the following, whether located within the bounds of a unit or not:

1. All structural parts of the building, including without limitation foundations, columns, joists, beams, supports, supporting walls, floors, ceiling and roofs.

2. Patios, yards, courts and driveways which are not limited common areas and facilities as defined herein.

3. The roadways contained therein, provided that such roadways shall cease to be part of the common areas and facilities when and if dedicated to public use with the consent of the association of unit owners and accepted by the public authority having jurisdiction.

4. Any utility pipe or line or system servicing more than a single unit, and all ducts, wires, conduits and other accessories used therewith, but excluding any pipe or line or accessory connecting a single unit to a main or central pipe or line or system or to a pipe or line or system servicing more than a single unit.

5. All other parts of the condominium property necessary or convenient to its existence, maintenance and safety, or normally in common use, or which have been designated as common areas and facilities in the drawings.

6. The limited common areas and facilities hereinafter described.

7. All repairs and replacements of any of the foregoing.

E. Description of Limited Common Areas and Facilities. Each unit owner is hereby granted an irrevocable license to use and occupy the limited common areas and facilities reserved exclusively for the use of his unit, which shall consist of all the common areas and facilities, including but not limited to a balcony and/or patio, yard, and a garage and driveway which are intended for the exclusive service of the unit, the use and occupancy of which shall in each case be limited to such unit.

4. STATEMENT OF PURPOSES, USE AND RESTRICTIONS.

A. Purposes. The purposes of the condominium property are to provide housing and recreational facilities

for the unit owners and their respective families, tenants, guests and servants.

B. Restrictions on Use. The units and common areas and facilities shall be used and occupied as follows:

1. No part of the condominium property shall be used for other than housing and the related common purposes for which the condominium property was designed. Each unit shall be used and occupied as a residence for a single family and for no other purpose.

2. There shall be no obstruction of the common areas and facilities nor shall anything be stored in the common areas and facilities without the prior written consent of the management committee, except as is otherwise provided herein.

3. Nothing shall be done or kept in any unit or in the common areas and facilities which will increase the rates of insurance on the buildings or contents thereof beyond that customarily applicable for residential use, without the prior written consent of the management committee. No unit owner shall permit anything to be done or kept in his unit or in the common areas and facilities which will result in the cancellation of insurance on any building, or the contents thereof, or which would be in violation of any law or regulation of any governmental authority. No waste shall be committed in the common areas and facilities.

4. No unit owner shall cause or permit anything (including without limitation a sign, awning, canopy, shutter, storm door, screen door, radio or television antenna) to hang, be displayed or otherwise affixed to

or placed on the exterior walls or roof or any part thereof, or the outside of windows or doors, without the prior written consent of the management committee.

5. No animals or birds of any kind shall be raised, bred or kept in any unit or in the common areas and facilities, except that dogs, cats and other household pets may be kept in units, subject to the rules adopted by the association of unit owners, provided that they are not kept, bred or maintained for any commercial purpose; and provided further that any such pet causing or creating a nuisance or disturbance shall be permanently removed from the condominium property upon ten days written notice from the management committee.

6. No noxious or offensive activity shall be carried on in any unit or in the common areas and facilities, nor shall anything be done therein, either willfully or negligently, which may be or become an annoyance or nuisance to the other unit owners or occupants.

7. Nothing shall be done in any unit or in, on or to the common areas and facilities which will impair the structural integrity of the buildings or any part thereof, or which would structurally change the buildings or any part thereof, except as is otherwise provided herein.

8. No clothes, sheets, blankets, laundry of any kind or other articles shall be hung out or exposed on any part of the common areas and facilities, except in a patio court in such manner as not to be visible except from the unit for which such courtyard is reserved. The common areas and facilities shall be kept free and clear of all rubbish, debris and other unsightly materials.

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9. Except in a patio court in such manner as not to be visible except from the unit for which such court is reserved, or (subject to the rules) on driveways or in other areas specifically designed and intended for such purposes, there shall be no playing, lounging or parking or placing of baby carriages, playpens, bicycles, wagons, toys, vehicles, benches or chairs in or on any part of the common areas and facilities.

10. No industry, business, trade, occupation or profession of any kind, whether for commercial, religious, educational, charitable or other purposes shall be conducted, maintained, or permitted on any part of the condominium property, except such as may be permitted by the management committee and subject to the rules, nor shall any "For Sale" or "For Rent" signs or other window displays or advertising be maintained or permitted by any unit owner on any part of the condominium property or in any unit therein, except that:

(i) the Declarant may perform or cause to be performed such work as is incident to the completion of the development of the condominium property, or to the sale or lease of units owned by the Declarant;

(ii) the Declarant or its agent may place "For Sale" or "For Rent" signs on any unsold or unoccupied units and may place such other signs on the condominium property as may be required to facilitate the sale or lease of unsold units;

(iii) the association of unit owners or the management committee or its agent or representative may place "For Sale" or "For Rent" signs on any unit or on the condominium property for the purpose of facilitating the disposal of units by any unit owners, mortgagee or the association of unit owners; and

(iv) a unit owner with respect to a unit, and the association of unit owners or management committee or its agent or representative with respect to the common areas and facilities, may perform or cause to be performed any maintenance, repair or remodeling work, or other work, required or permitted by this Declaration.

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5. OWNERSHIP AND USE.

A. Ownership of a Unit. Except with respect to any of the common areas and facilities located within the bounds of a unit, each unit owner shall be entitled to the exclusive ownership and possession of his unit and to the ownership of an undivided interest in the common areas and facilities in the percentage expressed in Appendix B hereof.

B. Prohibition Against Subdivision of a Unit. No unit owner shall, by deed, plat, lease or otherwise, subdivide or in any manner cause his unit to be separated into tracts or parcels smaller than the whole unit as shown on the map.

C. Ownership of Common Areas and Facilities. The common areas and facilities shall be owned by the unit owners as tenants in common, and ownership thereof shall remain undivided. No action for partition of any part of the common areas and facilities shall be maintainable, except as specifically provided in the Utah Condominium Ownership Act, nor may any unit owner otherwise waive or release any rights in the common areas and facilities.

D. Use of Common Areas and Facilities. Except with respect to limited common areas, each unit owner may use the common areas and facilities in accordance with the purposes for which they are intended, but subject to this Declaration and the By-Laws, which right of use shall be appurtenant to and run with his unit.

E. Interest in Common Areas and Facilities. The percentage of interest in the common areas and facilities of each unit has been determined by the Declarant on the basis of size in accordance with the Utah Condominium Ownership Act, Sec. 57-8-7, U.C.A., which percentages are contained in Appendix B hereof. The square footage figures set forth in Appendix B include floor space of finished areas; unfinished

basements and attics are not included. The size of additional units shall be similarly determined in calculating the interest of all units in the project's common areas and facilities.

F. Use of Limited Common Areas and Facilities. A unit owner's use and occupancy of the limited common areas and facilities reserved for his unit shall be subject to and in accordance with this Declaration and the By-Laws. Each unit owner shall maintain the patio and/or balcony, garage and driveway, the use of which is reserved for his unit. The association of unit owners shall maintain the remainder of the limited common areas and facilities.

6. AGENT FOR SERVICE OF PROCESS.

The name and address of the person in Davis County, State of Utah, appointed as the first agent to receive service of process in matters pertaining to the property as provided under the Utah Condominium Ownership Act is:

Lee E. Burbidge
1920 North 2550 East
Layton, Utah

The agent may be changed from time to time by filing appropriate instruments.

7. PERCENTAGE OF OWNERSHIP AND VOTING RIGHTS.

The percentage of ownership in the common areas and facilities of the condominium shall be for all purposes, including voting. The common expenses shall be allocated among the unit owners in accordance therewith. The percentage of ownership in the common areas and facilities shall be as set forth in Appendix B, provided, however, that Declarant shall have the right and authority to alter such percentage if and when the supplemental Declarations and the record of survey maps for the subsequent phases are recorded, it being the intent that the aggregate percentage of ownership in the common areas and facilities of all phases

shall equal 100 percent. For that purpose, Declarant does hereby irrevocably reserve the right, power and authority to amend or supplement this Declaration upon said instruments creating subsequent phases being recorded. Upon such amendment being made and recorded, the percentage of ownership in the common areas and facilities shall be finally fixed.

8. EASEMENTS.

A. The management committee may hereafter grant easements for utility purposes for the benefit of the condominium property, including the right to install, lay, maintain, repair and replace water mains and pipes, sewer lines, gas mains, telephone wires and equipment, and electrical conduits and wires over, under, along, on and through any portion of the common areas and facilities.

B. An easement in favor of each unit owner is hereby established to permit such owner to attach draperies, pictures, mirrors and like decorations and furnishings to the interior surfaces of the perimeter and interior walls and ceilings, consistent with rules and regulations established by the management committee.

C. Each unit shall be subject to such easement as may be necessary for the installation, maintenance, repair or replacement of any common areas and facilities located within the boundaries of such unit.

D. In the event that by reason of the construction, reconstruction, settlement or shifting of any building, any part of the common areas and facilities encroaches or shall thereby encroach upon any part of the common areas and facilities or any other unit, valid easements for such encroachment and the maintenance of such encroachment are hereby established and shall exist for the benefit of such unit and the common areas and facilities, as the case may be,

so long as all or any part of the building containing any such unit shall remain standing; provided, however, that in no event shall a valid easement for any encroachment be created in favor of any unit owner or in favor of the unit owners as owners of the common areas and facilities if such encroachment occurred due to the willful conduct, negligent act or omission of such unit owner or owners.

E. A non-exclusive easement is hereby reserved to the Declarant and to its successors and assigns to use the paved portion of the private streets within the tract described in Exhibit A and shown on the map, for purposes of ingress and egress from the additional property described in Exhibit D hereof, on foot or by vehicle, subject to the same regulations as are contained in this Declaration and in the rules; provided, however, that the management, maintenance (including snow removal), repair and replacement of said paved portion as a part of the common areas and facilities shall be entirely the responsibility of the association, which shall have the sole authority in such matters exercisable in the full discretion of the association pursuant to and in accordance with this Declaration, and the Declarant and its successors and assigns shall have no responsibility or authority with respect thereto; and to connect to any water mains and pipes, sewer lines, gas mains, telephone wires and equipment and electrical conduits and wires, and any other utility facilities and appurtenances over, under, along and through any portion (paved or unpaved) of the common areas and facilities occupied by the private streets designated in the map for purposes of providing utility services of all kinds for the additional property described in Exhibit D hereof, without any payment or other obligation

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The management committee shall be responsible for the control, operation and management of the project in accordance with the provisions of the Act, this Declaration and such administrative, management and operation rules, and regulations as it may adopt from time to time as herein provided, and all agreements and determinations lawfully made and entered into by the committee.

The management committee shall have the authority to provide such facilities, in addition to those for which provision has already been made, as it may deem to be in the best interest of the unit owners and to effect the necessary amendment of documents and maps in connection therewith.

The management committee shall be known by such name or designation as it, or the unit owners, at any meeting may assign.

10. CHANGE IN OWNERSHIP.

Whenever there is a change of ownership of a residental unit and its appurtenant rights, for whatever reason, the management committee or the manager may require as condition to recognizing the new unit owner or owners as such, that the new unit owner or owners furnish evidence substantiating the new ownership.

11. ASSESSMENTS.

Every unit owner shall pay his proportionate share of the common expenses, which share shall be equal to the percentage of undivided interest in the common areas and facilities as set forth in Appendix B, as amended, from time to time as provided in paragraph 24 of this Declaration. Payment thereof shall be in such amounts and at such times as the management committee determines in accordance with the Act, the Declaration or the By-Laws. There shall be a

lien for nonpayment of common expenses as provided by Utah Code Annotated, §57-8-20 (1953 as amended). The lien for nonpayment of common expenses may be enforced as provided therein and as provided in the By-Laws.

12. INSURANCE.

A. The management committee shall obtain and maintain at all times insurance of the type and kind as provided herein and including insurance for such other risks, of a similar or dissimilar nature, as are or shall hereby customarily be covered with respect to other properties similar to the property in construction, design and use. The management committee shall make every reasonable effort to obtain insurance with the following provisions or endorsements:

1. Exclusive authority to adjust losses shall be vested in the management committee as insurance trustee.

2. The insurance coverage shall not be brought into contribution with insurance purchased by individual unit owners or their respective mortgagees.

3. Each unit owner may obtain additional insurance covering his real property interest at his own expense.

4. The insurer waives its right of subrogation as to any claims against each unit owner.

5. The insurance coverage cannot be cancelled, invalidated or suspended because of the conduct of any one or more individual owners or their respective lessees, employees, agents, contractors and guests.

6. The insurance coverage cannot be cancelled, invalidated or suspended because of the conduct of any officer or employee of the association or management

committee or their employees, agents or contractors, without prior demand in writing that the management committee cure the defect, and then only if the defect is not cured within 15 days.

B. The management committee, for the benefit of the property and the unit owners, shall maintain a policy or policies of casualty and multi-risk "all peril" insurance on the property, with the provisions and endorsement as set forth in paragraph 12.A.1 above, if obtainable, also with extended coverage endorsements, for the full insurable replacement value of the units, common areas and facilities, items of common personal property and fixtures, payable to the management committee as insurance trustee, to be disbursed in accordance with the terms of this Declaration. The limits and coverage of said insurance shall be reviewed at least annually by the management committee and shall include an appraisal of the property. Said policy or policies shall provide for a separate loss payable endorsement in favor of the mortgagee or mortgagees, if any, of each unit.

C. The management committee shall obtain a policy or policies of insurance insuring the management committee, the unit owners and their respective lessees, servants, agents or guests against any liability to the public or to the owners of units, members of the households of unit owners and their respective invitees or tenants, incident to the ownership and/or use of the property. Limits of liability under such insurance shall not be less than $1,000,000 for any one person injured in any one occurrence, and shall not be less than $100,000 for property damage in each occurrence. The limits in coverage of said liability policy or policies shall be issued on a comprehensive liability basis and, if

possible, shall provide cross-liability endorsements for possible claims of any one or more or group of insureds against any one or more or group of insureds, without prejudice to the right of a named insured under the policies to maintain an action against another named insured.

D. Each unit owner shall be required to notify the management committee of, and shall be liable for any increased insurance premium for insurance maintained by the management committee occasioned by, all improvements made by the unit owner to his unit, the value of which is in excess of $1,000. Each unit owner shall bear the risk of loss for all improvements made to his unit that were not the subject of notice to the management committee.

E. Any unit owner who obtains individual insurance coverage covering any portion of the property, other than personal property belonging to such unit owners, shall be required to file a copy of such individual policy or policies with the management committee within 30 days after obtaining such insurance coverage.

F. No unit owner shall be entitled to exercise his right to maintain insurance coverage in such a way as to decrease the amount that the management committee, on behalf of all of the unit owners, may realize under any insurance policy that the management committee may have in force covering the property or any part thereof at any time.

13. DESTRUCTION OR DAMAGE.

In the event of damage to or destruction of part or all of the improvements in the condominium project, the following procedures shall apply:

A. If proceeds of the insurance maintained by the management committee are alone sufficient to repair or

reconstruct the damaged or destroyed improvement, such repair or reconstruction shall be carried out.

B. If less than 75 percent of the project's improvements are destroyed or substantially damaged, and if proceeds of the insurance maintained by the committee are not alone sufficient to accomplish repair or reconstruction, restoration shall be carried out and all the unit owners shall be assessed for any deficiency on the basis of their respective percentages of undivided interest in the common areas and facilities.

C. If 75 percent or more of the project's improvements are destroyed or substantially damaged, if proceeds of the insurance maintained by the management committee are not alone sufficient to accomplish restoration, and if the unit owners, within 100 days after the destruction or damage, by a vote of at least 75 percent, elect to repair or reconstruct the affected improvements, restoration shall be accomplished in the manner directed under paragraph B above.

D. If 75 percent or more of the project's improvements are destroyed or substantially damaged, if proceeds of the insurance maintained by the committee are insufficient to accomplish restoration, and if the unit owners do not, within 100 days after the destruction or damage and by vote of at least 75 percent, elect to repair or reconstruct the affected improvements, the management committee shall promptly record with the Davis County Recorder a notice setting forth such facts. Upon the recording of such notice, the provisions of subsections (1) through (4) of §57-8-31, Utah Code Annotated (1953 as amended), shall apply and shall govern the rights of all parties having an interest in the project or any of the units.

E. In the event of substantial damage to or destruction of any unit or to 75 percent or more of the project's

improvements, the mortgagee of any affected unit, and all mortgagees in the event 75 percent of the project's improvements are damaged or destroyed, shall be given written notice within 30 days of such damage or destruction. No provision herein will entitle the owner of a unit or other party to priority over such mortgagee with respect to the distribution to such unit of any insurance proceeds.

Any reconstruction or repair which is required to be carried out by this paragraph 13 shall be accomplished at the instance and direction of the management committee. Any determination which is required to be made by paragraph 13 regarding the extent of damage to or destruction of project improvements shall be made as follows: The management committee shall select three MAI appraisers; each appraiser shall independently arrive at a figure representing the percentage of project improvements which have been destroyed or substantially damaged; the percentage which governs the application of the provisions of this paragraph 13 shall be the average of the three appraisal figures.

14. TERMINATION.

All of the owners may remove the property from the provisions of the Act by an instrument duly recorded to that effect, provided that the holders of all liens affecting any of the units consent or agree by instruments duly recorded that their liens be transferred to the percentage of the undivided interest of the unit owners in the property.

Upon removal of the property lien from the provisions of the Act, the unit owners shall own the property and all assets of the association as tenants in common, and the respective mortgagees and lienors shall have mortgages and liens upon the respective undivided interests of the unit owners. Such undivided interests of the unit owners shall be the same as the percentage of undivided interest in the

common areas and facilities appurtenant to the owners' units prior to removal from the Act.

15. EMINENT DOMAIN.

Insofar as not inconsistent with §57-8-32.5, Utah Code Annotated, the following shall apply:

A. Whenever any proceeding is instituted that could result in the temporary or permanent taking, injury or destruction of all or part of the common areas and facilities or one or more units or portions thereof by the exercise of the power of or power in the nature of eminent domain or by an action or deed in lieu of condemnation, the management committee and each unit owner and each mortgagee of affected units shall be entitled to notice thereof, which notice shall be provided by the management committee, and the management committee shall act as agent for each unit owner, except for those unit owners who at their respective expense participate in the proceedings incident thereto. No provision herein will entitle the owner of a unit or other party to priority over a mortgagee of such unit with respect to the distribution to such unit of the proceeds of any award or settlement.

B. With respect to common areas and facilities, any damages or awards shall be determined for such taking, injury or destruction as a whole and not for each unit owner's interest therein. After such determination, each unit owner shall be entitled to a share in the damages in the same proportion as his percentage of undivided interest of the common areas and facilities. This provision does not prohibit a majority of unit owners from authorizing the management committee to use such damages or awards for replacing or restoring the common areas and facilities so taken on the remaining land or on other acquired land, provided that this Declaration and map are duly amended.

C. With respect to one or more units or portions thereof, the damages or awards for such taking shall be deemed to be proceeds from insurance on account of damage or destruction pursuant to paragraph 13 hereof and shall be deposited with the management committee as trustee. Even though the damage or awards may be payable to one or more unit owners, the unit owners shall deposit the damages or awards with the management committee as trustee, and in the event of failure to do so, at the option of the management committee, either a special assessment shall be made against a defaulting unit owner of a unit in the amount of this award, or the amount of such award shall be set off against the sums hereafter made payable to such unit owner. The proceeds of the damages or awards shall be distributed or used in a manner, and the units owners of affected units shall have the rights, provided in paragraph 13 for insurance proceeds, provided the property is removed from the provisions of the Act. If the property is not removed from the provisions of the Act and one or more units are taken, in whole or in part, the taking shall have the following effects:

1. If the taking reduces the size of a unit and the remaining portion of the unit may be made tenantable, the unit shall be made tenantable. If the cost of such work exceeds the amount of the award, the additional funds required shall be assessed against the owner of the unit. The balance of the award, if any, shall be distributed to the unit to the extent of the unpaid balance of its mortgage, and the excess, if any, shall be distributed to the unit owner. If there is a balance of the award distributed to the unit owner or a mortgagee, the unit owner's percentage of undivided interest in the common areas and facilities shall be

equitably reduced. This shall be done by reducing such interest in the proportion by which the floor area of the unit is reduced by the taking, and then recomputing the percentages of undivided interests of all unit owners in the common areas and facilities.

2. If the taking destoys or so reduces the size of a unit that it cannot be made tenantable, the award shall be paid to the mortgagee of the unit to the extent of the unpaid balance of its mortgage, and the excess, if any, shall be paid to the unit owner, whereupon the unit owner shall cease to be a member of the association of unit owners. The remaining portion of such unit, if any, shall become a part of the common areas and facilities and shall be placed in condition for use by all unit owners in the manner approved by the management committee. If the cost of such work shall exceed the balance of the fund from the award for the taking, such work shall be done only if approved by a majority of the unit owners. The percentages of undivided interests in the common areas and facilities appurtenant to the units that continue as part of the property shall be equitably adjusted to distribute the ownership of the common areas and facilities among the reduced number of unit owners, and the management committee shall file an amendment to the Declaration and map to reflect the changes in the property and the percentages of undivided interest of the remaining units. The management committee is authorized to record such amendment without approval of the association of unit owners.

16. MORTGAGE PROTECTION.

A. The term "mortgage" as used herein shall mean any recorded mortgage having priority over other mortgages

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and shall include a recorded deed of trust. The term "mortgagee" shall mean the owner and holder of a mortgage and shall include a beneficiary under a deed of trust.

B. The management committee shall maintain a roster of unit owners from the evidence of change of ownership furnished to the management committee, which roster shall include the mailing addresses of unit owners. If the management committee has been given notice of the necessary information, the management committee shall maintain another roster which shall contain the name and address of each mortgagee of a unit. Each notice shall consist of a certified copy of the recorded instrument evidencing the title of the mortgagee. The mortgagee shall be stricken from the roster upon receipt by a management committee of a request from the mortgagee or of a certified copy of a recorded release or satisfaction of the mortgage. Notice of such removal shall not be given to the mortgagee unless the removal is requested by the mortgagee.

C. Any mortgagee on any unit is entitled to written notification from the management committee of any default by the mortgagor of such unit in the performance of such mortgagor's obligation under the Declaration which is not cured within 30 days.

D. Any institutional holder of a first mortgage on a unit shall, upon prior written request, be entitled to (a) inspect the books and records of the association of unit owners, (b) receive an annual financial statement of the project within 90 days following the end of any fiscal year of the association of unit owners, and (c) receive a copy of the minutes of any meeting of the association of unit owners.

E. A mortgagee of any unit who comes into possession of the unit pursuant to the remedies provided in the

mortgage, foreclosure of mortgage, or deed (or assignment) in lieu of foreclosure, shall take the property, free of any claims or unpaid assessments or charges against the mortgaged unit which accrued prior to the time such mortgagee comes into the possession of the unit (except for claims for a prorata share of such assessments or charges resulting from a prorata reallocation of such assessment or charges to all units, including the mortgaged unit).

F. The liens created under the Act or pursuant to this Declaration or By-Laws upon any unit shall be subject and subordinate to, and shall not affect the rights of a mortgagee upon such interest made in good faith and for value, provided that after the foreclosure sale, a lien may be created for non-payment of common expenses on the interest of the purchaser at the foreclosure sale to secure all common expense assessments assessed hereunder to such purchaser as an owner after the date of such foreclosure sale, which said liens, if any claimed, shall have the same effect and be enforced in the same manner as provided herein.

G. No amendment to this paragraph shall affect the rights of a mortgagee recorded prior to the recordation of any such amendment not otherwise entitled thereto.

17. SALE OR LEASE; RIGHT OF FIRST REFUSAL.

A. No unit owner may transfer a unit or any interest therein by sale or lease without approval of the management committee, except to another owner. The approval of the management committee required for the transfer of ownership or interest of a unit or lease of a unit shall be requested as follows:

1. A unit owner intending to make a bona fide sale or lease of a unit or any interest therein shall give to the management committee notice of such intention, together with the name and address of the intended purchaser or lessee and such other information

concerning the intended purchaser or lessee as the management committee may reasonably require. The notice shall be accompanied by an executed copy of the proposed contract of sale or proposed lease.

2. If the notice to the management committee herein required is not given at any time after receiving knowledge of the transaction, or in the event of transferring ownership or possession of a unit, the management committee at its election and without notice may approve or disapprove the transaction or ownership. If the management committee disapproves the transaction or ownership, the management committee shall proceed as if it had received the required notice on the date of such disapproval.

B. Within 30 days after the receipt of such notice and information, the management committee shall approve or disapprove the proposed sale or lease. If approved, the approval shall be set forth in a certificate executed by the management committee. The certificate shall be delivered to the purchaser and shall be recorded at the expense of the purchaser.

C. If the management committee shall disapprove a transfer of ownership of a unit, of an interest in the unit, or a lease of a unit, within 30 days after the receipt of such notice and information, the management committee shall deliver or mail by certified mail to the unit owner an agreement to purchase or lease by a purchaser or lessee, approved by the management committee, to whom the unit owner must sell or lease the unit upon the same terms as the disapproved agreement.

1. In the event the disapproved offer to purchase provides for payment other than by cash and/or the assumption of or taking subject to a mortgage, for

example by exchange of property, the purchaser or lessee provided by the management committee shall have the option to have the fair market value of the unit or the fair market value of the lease be determined by the average of two appraisals of the unit performed by two MAI appraisers, one appointed by the management committee and one appointed by the unit owner desiring to sell or lease. The expense of the appraisal shall be paid by the proposed purchaser or lessee. The purchase price shall be the average of the two appraisals and shall be paid in cash or upon terms approved by the seller, or the lease terms shall be those as set forth in the proposed lease. The sale or lease shall be closed within 30 days after the delivery or mailing of said agreement to purchase or proposed lease or within 30 days of the determination of the sales price or the lease payments, if such is done through the appraisal method referred to above. A certificate executed by the management committee approving the purchaser or lessee shall be recorded at the expense of the purchaser or lessee.

2. If the management committee shall fail to provide a purchaser or lessee upon the demand of the selling unit owner, or if a purchaser or lessee furnished by the management committee shall default in the agreement to purchase or lease, then notwithstanding the disapproval, the proposed transaction shall be deemed to have been approved, and the management committee shall furnish a certificate of approval as provided, which shall be recorded at the expense of the purchaser.

D. In the event any unit owner shall attempt to sell or lease his unit without affording to the other unit owners the right of first refusal herein provided, such sale or lease shall be wholly null and void and shall confer no title or interest whatsoever upon the intended purchaser or lessee.

E. The subleasing or subrenting of said interest shall be subject to the same limitations as are applicable to the leasing or renting thereof. The liability of the unit owner under these covenants shall continue, notwithstanding the fact that he may have leased or rented said interest as provided herein.

F. In no case shall the right of first refusal reserved herein affect the right of a unit owner to subject his unit to a trust deed, mortgage or other security instrument whereby a bank, insurance company, savings and loan association or other similar institution becomes the owner and holder of such trust deed, mortgage or security instrument.

G. The failure of or refusal by the management committee to exercise the right to so purchase or lease shall not constitute or be deemed to be a waiver of such right to purchase or lease when a unit owner receives any subsequent bona fide offer from a prospective purchaser or tenant.

H. In the event of default on the part of any unit owner under any first mortgage made in good faith and for value, which entitled the holder thereof to foreclose the same, any sale under such foreclosure, including delivery of a deed to the first mortgagee in lieu of such foreclosure, shall be made free and clear of the provisions of

this paragraph 17, and the purchaser (or grantee under such deed in lieu of foreclosure) of such unit shall be thereupon and thereafter subject to the provisions of this Declaration. If the purchaser, following such foreclosure sale (or grantee under deed given in lieu of such foreclosure), shall be the then holder of the first mortgage, or its nominee, the said holder or nominee may thereafter sell and convey the unit free and clear of the provisions of this paragraph 17, but its grantee shall thereupon and thereafter be subject to all of the provisions thereof.

I. The transfer of a deceased joint tenant's interest to the surviving joint tenant or the transfer of the decedent's interest to a devisee by will or his heirs at law under intestacy laws shall not be subject to the provisions of this paragraph 17.

J. Every sale or lease shall be subject to all the provisions contained herein, including restrictions on use. Failure to comply with the terms hereof shall constitute a default under any lease.

18. CONVEYANCES, EASEMENTS.

A. Every deed, lease, mortgage or other instrument may describe a unit by its identifying number and letter designation set forth in Appendix A and in the map. Every such description shall be deemed good and sufficient for all purposes and shall be deemed to convey, transfer, encumber or otherwise affect the unit owner's corresponding percentage of undivided ownership in the common areas and facilities, as a tenant in common, as set forth in Appendix B, as amended, even though the same is not exactly mentioned or described.

B. Every deed, lease, mortgage or other similar instrument shall be deemed to:

1. Except and reserve with respect to a unit: (i) any portion of the common areas and facilities lying within said unit; (ii) easements through said unit, appurtenant to the common areas and facilities and all other units, for support and repair of the common areas and facilities and all other units; and (iii) easements appurtenant to the common areas and facilities for encroachment upon the air space of said unit by those portions of the common areas and facilities located within said unit.

2. Include with respect to a unit non-exclusive easements for ingress and support of said unit through the common areas and facilities, for the repair of said unit through all other units and through the common areas and facilities, and for the use of the balcony, patio, storage areas and parking spaces as indicated in Appendix A and the map.

3. Except and reserve, with respect to the undivided percentage interest in the common areas and facilities, non-exclusive easements appurtenant to all units for ingress, egress, support and repair and exclusive easements appurtenant to each unit for the use of the balcony, patio, storage areas and parking spaces as set forth in Appendix A and the map.

4. Include, with respect to the undivided percentage interest in the common areas and facilities, non-exclusive easements through each unit for support and repair of the common areas and facilities and non-exclusive easements for encroachments upon the air space of all of the units by and for the portions of the common areas and facilities lying within the units.

19. MAINTENANCE OF UNITS.

Each unit owner, at his own expense, shall keep the interior of his unit and its equipment and appurtenances in good order, condition and repair, and in a clean and sanitary condition, and shall do all redecorating and painting which may at any time be necessary to maintain the good appearance of his unit. Except to the extent that the management committee is protected by insurance against such injury, the unit owner shall repair all injury or damages to the unit, or condominium project caused by the act, negligence or carelessness of the unit owner or that of any lessee or sublessee or any member of the unit owner's family or of the family of any lessee or sublessee or any agent, employee or guest of the owner or his lessee or sublessee, and all such repairs, redecorating and painting shall be of a quality and kind equal to the original work. In addition to decorating and keeping the interior of the unit in good repair, the unit owner shall be responsible for the maintenance or replacement of any plumbing, fixtures, refrigerators, air conditioning and heating equipment, dishwashers, disposals, ranges, etc., that may be in or connected with the unit. The management committee shall be responsible for maintenance and upkeep of all conduits, ducts, plumbing and wiring and other facilities for the furnishing of heat, gas, light, power, air conditioning, water and sewer contained in the portions of the units that service part or parts of the property other than the unit in which they are contained. Without the written permission of the management committee first had and obtained, the unit owner shall not make or permit to be made any structural alteration, improvement or addition in or to the unit, patios, balconies, garages, or

in or to the exterior of the building, and shall not paint or decorate any portion of the exterior of the building in which his unit is located.

20. RIGHT OF ENTRY.

The management committee and its duly authorized agents shall have the right to enter any and all of the units in case of an emergency originating in or threatening such unit or any other part of the project, whether or not the unit owner or occupant thereof is present at the time. The committee and its duly authorized agents shall also have the right to enter into any and all of said units at all reasonable times as required for the purpose of making necessary repairs upon the common areas and facilities of the project or the purpose of performing emergency installations, alterations or repairs to the mechanical or electrical devices or installations located therein or thereon; provided, however, such emergency installations, alterations or repairs are necessary to prevent damage or threatened damage to other units in the project; and provided further that the unit owner affected by such entry shall first be notified thereof if available and if time permits.

21. ADMINISTRATIVE RULES AND REGULATIONS.

The management committee shall have the power to adopt and establish by resolution such building management and operational rules as it may deem necessary for the maintenance, operation, management and control of the project, and the committee may, from time to time by resolution, alter, amend and repeal such rules. When a copy of any amendment or alteration or provision for repeal of any rule or rules has been furnished to the unit owners, such amendment, alteration and provision shall be taken to be a part

of such rules. Unit owners shall at all times obey such rules and see that they are faithfully observed by those persons over whom they have or may exercise control and supervision, it being understood that such rules shall apply and be binding upon all unit owners and/or occupants of the condominium.

22. OBLIGATION OF COMPLIANCE.

Each unit owner, tenant or occupant of a unit shall comply with the provisions of the Act, this Declaration, the By-Laws, and the rules and regulations, all agreements and determinations lawfully made and/or entered into by the management committee or the unit owners, when acting in accordance with their authority, and any failure to comply with any of the provisions thereof shall be grounds for an action by the management committee to recover any loss or damage resulting therefrom or injunctive relief.

23. INDEMNIFICATION OF MANAGEMENT COMMITTEE.

Each member of the management committee shall be indemnified and held harmless by the unit owners against all costs, expenses and liabilities whatsoever, including without limitation attorney's fees reasonably incurred by him in connection with any proceeding in which he may become involved by reason of his being or having been a member of said committee, except in such cases wherein the member of the management committee is adjudged guilty of willful misfeasance or malfeasance in the performance of his duties.

24. EXPANSION OF THE CONDOMINIUM PROJECT.

A. Additional Property. The Declarant anticipates that the condominium project may be expanded to include certain real property described in Appendix D which adjoins the condominium property described in Appendix B hereof.

B. Reservation of Right to Expand. The first phase of the project includes eight condominium units, together with common areas and facilities. Declarant hereby reserves the right to expand the condominium project to include additional units of the same general type and of comparable quality in construction as the units in the present project, but no other assurances as to architecture, materials or type or size of units are made. The option to expand, as set forth herein, may be exercised by the Declarant, its successors or assigns, without the consent of any unit owners. Such units shall be constructed on the real property described in Appendix D attached hereto, or any portion thereof, subject to applicable zoning provisions of Layton City. The total number of units which may be constructed on said additional property shall not exceed 192 units, and the entire project, including the initial units and all subsequent phases, shall not exceed a total of 200 units, all of which shall be subject to the restrictions on use contained in paragraph 4.B hereof. Any portion of the real property described in Appendix D may be added to the condominium project and several portions may be added at different times, with no requirement as to the size or order of any addition, or all of said property may be added at one time, in accordance with this Declaration and the Condominium Ownership Act, as amended. Except as to the total number of units, there is no limitation as to the nature and location or locations of any improvements that may be made on any portions of the additional land; provided, however, that the average density of any such addition shall not exceed 12 units per acre. No assurances are made as to what improvements may be made or required in conjunction with construction of additional units. Limited common areas and

facilities created within the additional land shall be similar to the initial units, with no additional restriction upon Declarant.

C. Supplemental Declarations and Supplemental Maps. Such expansion may be accomplished by the filing for record by Declarant in the office of the County Recorder of Davis County, Utah, no later than seven years from the date this Declaration is recorded in said office, a supplement or supplements to this Declaration containing a legal description of the site or sites for new units, together with a supplemental map or maps containing the same information with respect to the new units as was required on the original map with respect to the initial units. The expansion may be accomplished in phases by successive supplements or in one supplemental expansion.

D. Expansion of Definitions. In the event of such expansion, the definitions used in this Declaration automatically shall be expanded to encompass and refer to the project as so expanded. E.g., "real property" shall mean the real property described in Appendix A hereof, plus any additional real property added to the project by a supplemental Declaration or by supplemental Declarations, and reference to this Declaration shall mean this Declaration as so supplemented. All conveyances of units after such expansion shall be effective to transfer rights in the project, as expanded, by references to the supplemental Declarations and the supplemental maps. The recordation in the office of the Davis County Recorder, Farmington, Utah, of a supplemental map incident to any expansion shall operate automatically to grant, transfer and convey, pro tanto, to then owners of units in the project as it exists before such expansion, the respective undivided interests in the

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new common areas added to the project as a result of such expansion, and to reduce, pro tanto, their percentage of interest in the original condominium property as it then exists. All phases will be assigned values on the same basis so that substantially identical units in all phases will be awarded substantially identical interests in the common areas. Such recordation shall also operate to vest in any then mortgagee of any unit in the project as it exists such interest so acquired by the owner of the unit encumbering the new common areas added to the project as a result of such expansion, and to conform the percentage interests of unit owners and mortgagees to the interests set forth in the supplemental Declaration.

E. Declaration Operative on New Units. The new units shall be subject to all the terms and conditions of this Declaration and of a supplemental Declaration, and the units therein shall be subject to condominium ownership with all the incidents pertaining thereto as specified herein, upon filing the supplemental map and supplemental Declaration in the office of the Davis County Recorder.

F. Right of Declarant to Adjust Percentages of Common Areas. Each deed of a unit shall be deemed to irrevocably reserve to Declarant the power to appoint to unit owners, from time to time, the percentages in the common areas set forth in supplemental or amended Declarations. A power coupled with an interest is hereby granted to Declarant and/or Lee E. Burbidge, as attorney in fact, to shift percentages of the common areas and facilities in accordance with supplemental or amended Declarations recorded pursuant hereto and each deed of a unit in the project shall be deemed a grant of such power of said attorney in fact.

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Various provisions of this Declaration and deeds and mortgages of the units may contain clauses designed to accomplish a shifting of the common areas. None of said provisions shall invalidate the other, but each shall be deemed supplementary to the other toward the end that a valid shifting of the common areas and facilities can be accomplished. The maximum interest in the common areas and facilities of the initial unit owners in this project shall be as indicated in Appendix B to the Declaration of Covenants, Conditions, Restrictions and By-Laws for Country Oaks Condominiums. Furthermore, each unit owner in this project shall have a minimum interest in the common areas of at least .300 percent (.003%) after all phases of this project have been filed.

25. AMENDMENT.

A. In addition to the amendment provisions provided in paragraph 24 above, and except as provided below, the unit owners shall have the right to amend this Declaration and/or the map upon the approval and consent of unit owners representing not less than two-thirds of the undivided interests in the common areas and facilities. Any amendment shall be accomplished by the recordation of an instrument wherein the management committee certifies that the unit owners representing at least two-thirds of the undivided interests in the common areas and facilities have approved and consented to any such amendment.

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B. Certain Prohibitions Imposed on Unit Owners. Unless at least 75 percent of the first mortgagee's (one vote for each mortgage owned) of individual condominium units have given their prior written approval, the unit owners shall not:

1. Change the prorata interest or obligations of any unit for purposes of levying assessments and charges and determining shares of the common areas and facilities of the project, except as provided in paragraph 24 of the Declaration of Covenants, Conditions, Restrictions and By-Laws for Country Oaks Condominiums.

2. Partition or subdivide any unit or the common areas of the project.

3. By act or omission seek to abandon or terminate the condominium status of the project, except as provided by statute in case of substantial loss to the units and common areas of the project.

4. By act or omission seek to abandon, partition, subdivide, encumber, sell or transfer the common elements, provided that the granting of easements for public utilities or for other public purposes consistent with the intended use of the common areas and facilities by the condominium project shall not be deemed a transfer within the meaning of this clause.

5. Use hazard insurance proceeds for losses to any condominium property for other than the repair, replacement or reconstruction of such improvements, except as provided herein or by statute in case of substantial loss to the units and/or the common areas and facilities of the condominium project.

26. VOTING.

At any meeting of the association of unit owners, each unit owner, including Declarant, either in person or by proxy, shall be entitled to the same number of votes as the percentage of undivided interest of the common areas and facilities assigned to his unit in Appendix B, as amended.

If there is more than one unit owner with respect to a particular unit, any or all of such unit owners may attend any meeting of the association, but it shall be necessary for all such unit owners present to act unanimously in order to cast the votes pertaining to their unit.

27. NOTICES.

Any notice permitted or required to be delivered as provided herein may be delivered either personally or by mail. If delivery is made by mail, it shall be deemed to be delivered 24 hours after a copy of the same has been deposited in the U.S. Mail, postage prepaid, return receipt requested. Notice to unit owners shall be addressed to each unit owner at the address given by such unit owner to the management committee for the purpose of service of such notice or to the unit of such unit owner if no such address has been given to the management committee. Such address may be changed from time to time by notice in writing to the management committee. Notice to the management committee shall be addressed to: Management Committee, Country Oaks Condominium, Association of Unit Owners, 1920 North 2550 East, Layton, Utah.

28. NO WAIVER.

The failure of the management committee or its contractors to insist, in one or more instances, upon the strict performance of any of the terms, covenants, conditions or restrictions of this Declaration or the By-Laws, or to exercise any right or option herein contained, or to serve any notice or to institute any action, shall not be construed as a waiver or a relinquishment for the future of such term, covenant, condition or restriction; but such term, covenant, condition or restriction shall remain in

full force and effect. The receipt and acceptance by the management committee or its contractor of the payment of any assessment from a unit owner, with knowledge of the breach of any covenant hereof, shall not be deemed a waiver of such breach, and no waiver by the management committee of any provision hereof shall be deemed to have been made unless expressed in writing and signed by the management committee.

29. SEVERABILITY.

The invalidity of any one or more phrases, sentences, clauses, paragraphs or sections hereof shall not affect the remaining portions of this instrument or any part thereof, all of which are inserted conditionally on their being held valid in law, and in the event that one or more of the phrases, sentences, clauses, paragraphs or sections contained herein should be invalid or should operate to render this agreement invalid, this instrument shall be construed as if such invalid phrase or phrases, sentence or sentences, clause or clauses, paragraph or paragraphs, section or sections, has not been inserted.

30. GENDER.

The singular, wherever used herein, shall be construed to mean the plural when applicable, and the necessary grammatical changes required to make the provisions hereof apply either to corporations or individuals, men or women, shall in all cases be assumed as though in each case fully expressed.

31. TOPICAL HEADINGS.

The topical headings of the paragraphs contained in the Declaration are for convenience only and do not define, limit or construe the contents of the paragraphs or of the Declaration.

32. EFFECTIVE DATE.

This Declaration shall take effect upon recording.

IN WITNESS WHEREOF, the undersigned, partners of Country Oaks Partnership, the owner of the land described in Appendix A of this Declaration, have set their hands this 1st day of October, 1975.

COUNTRY OAKS PARTNERSHIP,
Rice Family, Inc.

By _____
Its Pres.

N. A. Williams Family Corporation

By _____
Its Pres.

C. J. Larsen Family Corporation

By _____
Its _____

Lee E. Burbidge & Associates, Inc.

By _____
Its _____

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the 1st day of October, 1975, personally appeared before me Scott Rice, who being by me duly sworn did say that he is the President of Rice Family, Inc., a general partner of Country Oaks Partnership, and that this Declaration was signed in behalf of said Rice Family, Inc. by authority of its by-laws, and said Scott Rice acknowledged to me that said corporation executed the same.

_____
NOTARY PUBLIC
Residing at Salt Lake

My Commission Expires:

Oct. 8, 1978

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the 1st day of October, 1975, personally appeared before me Nelden A. Williams, who being by me duly sworn did say that he is the President of N. A. Williams Family Corporation, a general partner of Country Oaks Partnership, and that this Declaration was signed in behalf of said N. A. Williams Family Corporation by authority of its by-laws, and said Nelden A. Williams acknowledged to me that said corporation executed the same.

Tamara Tuft
NOTARY PUBLIC
Residing at Salt Lake

My Commission Expires:
Oct. 8, 1978

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the 1st day of October, 1975, personally appeared before me Carlos J. Larsen, who being by me duly sworn did say that he is the President of C. J. Larsen Family Corporation, a general partner of Country Oaks Partnership, and that this Declaration was signed in behalf of said C. J. Larsen Family Corporation by authority of its by-laws, and said Carlos J. Larsen acknowledged to me that said corporation executed the same.

Tamara Tuft
NOTARY PUBLIC
Residing at Salt Lake

My Commission Expires:
Oct. 8, 1978

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

On the 1st day of October, 1975, personally appeared before me Lee E. Burbidge, who being by me duly sworn did say that he is the President of Lee E. Burbidge & Associates, Inc., a general partner of Country Oaks Partnership, and that this Declaration was signed in behalf of said Lee E. Burbidge & Associates, Inc. by authority of its by-laws, and said Lee E. Burbidge acknowledged to me that said corporation executed the same.

My Commission Expires:
Oct. 8, 1978

Tamara Tuft
NOTARY PUBLIC
Residing at Salt Lake

WELLEBY CONDOMINIUM ASSOCIATION ONE, INCORPORATED, Appellant,

v.

The WILLIAM LYON COMPANY, Appellee.

No. 87-0194.

District Court of Appeal of Florida, Fourth District.

Dec. 30, 1987.

Rehearing Denied April 4, 1988.

Condominium association sought to foreclose liens upon unconstructed unit owner for past-due maintenance assessments. Both parties filed for summary judgment. The Circuit Court, Broward County, Patricia W. Cocalis, J., granted condominium unit owner summary judgment. On appeal, the District Court of Appeal adopted the findings and conclusions of law of the trial court, which held that: (1) term "condominium parcel" in declaration of condominium demonstrated that unit owner owned only his private dwelling, and was thus not liable for maintenance on unconstructed property, and (2) trial court's order allowing condominium unit owner to petition for attorney's fees was not appealable until petition was granted.

Affirmed.

Letts, J., concurred specially with opinion.

1. Condominium ⇐12

Scrivener's intentional description of condominium unit in declaration of condominium as "condominium parcel" demonstrated that condominium owners had no property interest outside their individual private dwellings; thus, liens for past-due maintenance assessments could not be attached to undeveloped property by condominium association, as no portion of that property was owned by condominium unit owners. F.S.1975, § 711.03(15).

2. Condominium ⇐13

Term "condominium parcel" as description of unit in condominium declaration limited unit owner's property interest to his individual private dwelling. F.S. 1975, § 711.03(15).

3. Appeal and Error ⇐119

Trial court's grant of right to petition court for attorney's fees, was not proper subject for appeal until order awarding such fees was made.

Neil F. Garfield of Law Offices of Neil F. Garfield, P.A., Lauderhill, for appellant.

Robert E. Ferris, Jr., of Gustafson, Stephens, Ferris, Forman & Hall, P.A., Fort Lauderdale, for appellee.

PER CURIAM.

We affirm the order entered on January 5, 1987, which amends and incorporates the "Orders on Motions for Summary Judgment and Final Summary Judgment in Favor of the William Lyon Company" dated December 19, 1986. Since the order and judgment as amended clearly state the facts and issues involved, we adopt that order:

This cause came on to be heard upon the Motion for Summary Judgment of the Plaintiff, and the Motion for Summary Judgment of the Defendant. The Court has examined the pleadings and the affidavits on file, and has heard argument of counsel. There are no issues of fact. Based upon the pleadings and affidavits on file, and the argument of counsel, the Court enters the following Orders and Final Summary Judgment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Declaration of Condominium of Welleby Townhome Condominium One was recorded in the Public Records of Broward County, Florida, on October 17th, 1974, in Official Record Book 5978, Page 793, et seq. This will be known as the Declaration of Condominium.

2. The Plaintiff, WELLEBY CONDOMINIUM ASSOCIATION ONE, INCORPORATED, is a Florida Non-Profit Corporation, and pursuant to the Declaration of Condominium is empowered to levy and collect assessments for the maintenance and management of the Condominium.

3. The Defendant, THE WILLIAM LYON COMPANY, at all times material, was the owner of certain real property located in Broward County, Florida, described as follows:

> Units # 101, # 102, # 103, # 104, # 105, # 203, # 204, # 401, # 402, # 421, and # 422, of Welleby Townhome Condominium One, according to the Declaration of Condominium thereof, as recorded in Official Record Book 5978, Page 793, et seq. of the Public Records of Broward County, Florida.

According to counsel for Plaintiff and Defendant, these lands described above are vacant and have no construction upon them.

4. On March 21st, 1986, the Plaintiff filed eleven (11) Claims of Lien against the lands owned by the Defendant for unpaid maintenance assessments which are recorded in Official Records Book 13268, Pages 11 through and inclusive of Page 21, all in the Public Records of Broward County, Florida.

5. Subsequent to filing these Liens, the Plaintiff filed this suit in the 17th Judicial Circuit in and for Broward County, Florida, seeking to foreclose these Claims of Lien. The Plaintiff alleged that the Defendant owned "condominium parcels", which were subject to assessment by the Plaintiff under § 718.116 of the Florida Statutes and pursuant to the Declaration of Condominium.

6. The Defendant filed its Answer and Affirmative Defenses, and later, by Order of this Court, amended its Affirmative Defenses. In its Answer, the Defendant stated that it dose (sic) not own "condominium units", as described in the Declaration of Condominium, or as defined under the Florida Statutes in force at the time that the Declaration of Condominium was recorded. In its Affirmative Defenses, and as amended, the Defendants alleged as to all of the Plaintiff's Counts, that it owned unimproved land with no apartments constructed on the land; stating further, that it does not own "condominium parcels" or "units", as defined by the Declaration of Condominium or the Florida Statutes, and therefore, its lands are not subject to an assessment by the Plaintiff.

7. The Plaintiff moved for a summary judgment with supporting affidavits, and the Defendant moved for a summary judgment with a supporting affidavit having attached to it the Declaration of Condominium.

8. Thus, as framed by the pleadings, the key issue before the Court is whether the lands owned by the Defendant are subject to assessment levied by the Plaintiff under the Declaration of Condominium and the Laws of Florida.

9. On October 17th, 1974, the date that the Delcaration (sic) of Condominium was recorded in the Public Records of Broward County, Florida, § 711.15(1) stated in pertinent part as follows:

> (1) A unit owner, regardless of how title is acquired, including without limitation a purchaser at a judicial sale, shall be liable for all assessments coming due while he is the owner of the unit.

10. § 711.15(1) has been amended and is now codified as § 718.116(1), and the exact wording can be found under that section.

11. The definition of "unit", as set forth in § 711.03(15), effective as of October 17th, 1974, read as follows:

> (15) "unit" means a part of the condominium property which is to be subject to private ownership. A unit may be in improvements, land, or land and improvements together, *as specified in the Declaration of Condominium.* (emphasis added).

12. § 711.03(15) has been recodified as § 718.103(16), and is an identical definition as that under § 711.03(15).

13. The Florida Statutes effective on October 17th, 1974, and those presently in

effect, evidence an intention by the legislature to have assessments made against unit owners. Both in the present Act, and that in effect on October 17th, 1974, is a definition for the word "unit". This definition permits a unit, which is the subject matter of an assessment against a private owner to be described in several different manners, as specified and as set forth in the Declaration of Condominium.

14. The Declaration of Condominium in question, does not use the word "unit" as the object of assessments. Rather, the scrivner (sic) of this document utilized the term "condominium parcel" as the object of assessments by the Condominium Association. As seen in Section VI, *Common Expenses*, on Pages 12 through 18, inclusive, of the Declaration of Condominium, assessments are to be made against condominium parcels. Under Sub-section "A" of that specific section, assessments are to be made only against the owners of "condominium parcels". Further, on Page 13 of the Declaration of Condominium it is stated as follows:

> The owner of each condominium parcel shall be liable to the condominium association for the share of common expenses set forth in the attached Exhibit "A".

15. Section VI of the Declaration of Condominium consistently uses the term "condominium parcels". In addition, that term is utilized so consistently throughout this Declaration as to evidence a plan by the scrivner (sic). The Court determines that the use of the word "condominium parcel" was intentional, and it is a defined term under this Declaration. The Court has noted that this term is utilized in more than one place in the Declaration, and the following are just some of the examples: Section III, *Property Interest*—B. Condominium Parcel, Pages 7-11, wherein the survey boundries (sic) of a "condominium parcel" are defined; Section V—*Membership in Welleby Condominium Association One, Inc.*; Section VI—*Expenses*; Sub-sections C and D; and Sections IX and XI.

16. A condominium parcel, is defined under the Declaration of Condominium, in Section I, Sub-section I, as follows:

> An apartment together with the undivided share in the common elements and all its easements, rights and interest which are pertinent to the apartment.

An apartment is defined as follows: "Section I—*Definitions:* (a) Apartment; *Unit*—Individual private dwelling."

[1, 2] 17. The definition section of the Declaration of Condominium specifically defines what a condominium parcel is. It is an apartment; and individual private dwelling. It is not raw, unimproved lands. The scrivner (sic) of the Declaration of Condominium possessed the option, pursuant to § 711.103(15) [§ 711.03(15)], of describing a "unit" (that object of any condominium assessment) in any number of different ways pursuant to that Florida Statute. In this instance the scrivner, (sic) taking advantage of the option granted to him by that Section, chose to describe a "unit" in terms of a "condominium parcel", which is an individual private dwelling. As permitted by Statute, this Declaration specifically describes the object of assessments as land and improvements, namely, an individual private dwelling, and the use of the term "condominium parcel" is so specifically used throughout this Declaration of Condominium, as to preclude any other interpretation as to what the object of assessments was to be against. Assessments, according to this Declaration, could not be assessed and levied against anything other than an individual private dwelling, and the Declaration would not permit any interpretation allowing an assessment against raw, unimproved lands upon which there is no private dwelling.

18. The Court is aware of the most recent case known as *Hyde Park Condo vs. Estero Island*, 486 So.2d (sic) (Fla. 1st DCA 1986). This case is distinguishable from the present situation in that, the definition of "unit" under the 1969 Condominium Act is different than the definition in force and effect on October 17, 1974. In the *Hyde Park* case, Supra, the declaration of condominium provided that assessments would

be against units. Units under the 1969 Condominium Act included any part of the condominium property which was subject to private ownership. This broad definition would encompass land, land and improvements, or improvements. Thus, the owner of unimproved property, in that case, was subject to an assessment because, the definitional requirements of the declaration of condominium and the Florida Statutes, at that time, would have defined his raw, unimproved land as a "unit." Such is not the case before this Court, because, the definition of "unit" under Florida Statute § 711.103(15) [§ 711.03(15)] permitted a "unit" to be described in any number of different ways. In the present case, the scrivner (sic) of this declaration sought to define a "unit" as a private dwelling, thus exempting from an assessment, raw, unimproved property.

ORDERS ON SUMMARY JUDGMENTS

Based upon the Conclusions of Law and the Findings of Fact of this Court, the Court Orders:

1. The Plaintiff's Motion for Summary Judgment is denied.

2. The Defendant's Motion for Summary Judgment is hereby granted.

FINAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

1. Based upon the Order of this Court granting a Summary Judgment in favor of the Defendant, the Court enters a Final Summary Judgment in favor of the Defendant and against the Plaintiff. The Plaintiff does not have legal authority to levy assessment against the Defendant's land. The Liens filed against the Defendant's lands are illegal.

2. Therefore, this Court orders the Clerk of the 17th Judicial Circuit in and for Broward County, Florida, to cancel and vacate the Claims of Lien filed against the lands owned by the Defendant; orders the Clerk of the Circuit Court to cancel and vacate the Lis Pendens filed herein; and further declares that the lands owned by the Defendant are not the subject matter of assessment, and that the assessments levied against those lands was a nullity and are therefore cancelled and rendered null and void.

3. The Complaint filed by the Plaintiff herein is hereby dismissed with prejudice, and a Judgment is entered in favor of the Defendant and against the Plaintiff on that Complaint.

4. That the Defendant, having prayed for attorney's fees in its Answer, pursuant to § 718.125, is hereby granted the right to present a Petition for Attorney's Fees to this Court. This Court specifically reserves jurisdiction of the subject matter and the parties thereto for purposes of assessing fees and costs against the Plaintiff and in favor of the Defendant at a subsequent hearing. The Court is also mindful that it has not disposed of the Counterclaim filed by the Defendant, and therefore, the Court specifically reserves jurisdiction of the subject matter and the parties hereto for determining the issues contained in the Counterclaim filed by the Defendant.

DONE AND ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida, this 19 day of December, 1986.

[3] We decline to address the issue of attorney's fees under section 718.125, Florida Statutes (1985). Since the trial court merely granted appellee the right to petition the court for attorney's fees, we must refrain from deciding this issue until the trial court rules.

AFFIRMED.

DOWNEY and GUNTHER, JJ., concur.

LETTS, J., concurs specially with opinion.

LETTS, Judge, concurring specially.

I concur in the result, but I am apprehensive that it may conflict with the case of *Hyde Park Condominium Association v. Estero Island Real Estate*, 486 So.2d 1 (Fla. 2d DCA 1986). As a consequence, and out of an abundance of caution, I

would certify the question to the Supreme Court.

BUCKEYE CELLULOSE CORPORATION.
Appellant,

v.

Robert T. WILLIAMS and the Florida Unemployment Appeals Commission, Appellees.

No. BT-228.

District Court of Appeal of Florida. First District.

Jan. 14, 1988.

As Modified on Denial of Rehearing March 17, 1988.

Employer appealed order of the Unemployment Appeals Commission affirming decision of appeals referee of Unemployment Compensation Appeals Bureau awarding claimant benefits. The District Court of Appeal, Shivers, J., held that harassment to which claimant was subjected was sufficient to constitute good cause for claimant to leave his employment.

Affirmed.

Thompson, J., dissented and filed opinion.

Social Security and Public Welfare
⇐584.30

Harassment to which unemployment compensation claimant was subjected was sufficient to constitute good cause for claimant to leave his employment, so as to entitle claimant to receive unemployment compensation benefits.

Jann Johnson and Rebecca S. Conlan, of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, and Marc S. Krass, Sr. Counsel for the Buckeye Cellulose Corp., Cincinnati, Ohio, for appellant.

John D. Maher, Tallahassee, for appellees.

SHIVERS, Judge.

Buckeye Cellulose Corporation (Buckeye) appeals an order of the Unemployment Appeals Commission affirming the decision of an appeals referee of the Unemployment Compensation Appeals Bureau that appellee Robert T. Williams is entitled to receive unemployment compensation benefits because he voluntarily left his job with Buckeye for good cause. We affirm the Unemployment Appeals Commission on all issues and find that the issue whether the referee's findings of fact are sufficient to support his conclusions merits discussion. Based on the record we conclude the evidence is sufficiently competent and substantial to support the final order. The referee is the fact finder and his findings have been affirmed by the agency. We did not hear the testimony and are not in a better or even equal position to evaluate the credibility of witnesses. As we stated in *Greenberg v. Simms Merchant Police Service*, 410 So.2d 566 (Fla. 1st DCA 1982), "a telephone conference is far superior to a cold, written record." *Id.* at 567.

Appellee Williams declared that when he quit his job in June, he told his department manager Larry James that he was leaving because of the harassment and pressure. He testified that he was coming to work and doing his job, but that every time he turned around his work was being questioned. He stated that he had gone to a drug treatment center for 30 days during the first part of the year; that his supervisor Larry James was new and when James found out where he had been and what he had been for, that he was then constantly accused of doing something wrong. Williams said that the same job he had been doing correctly for three years all of a sudden turned wrong, that he could not do it right anymore for the supervisor. Claimant Williams testified that on two separate occasions he was bumped from his shift by

SUPREME COURT—Continued

Title	Docket Number	* Date	Disposition	** Appeal from and Citation
Stevens v. State	72274	8/16/88	Mand. den.	
Taylor v. Gunter Trucking Co., Inc.	72273	7/19/88	Rev. den.	1st DCA 520 So.2d 624
The Florida Bar v. Blakeley	71054	9/22/88	Suspension Ordered	
The Florida Bar v. Bright	71426	9/22/88	Disbarment Ordered	
The Florida Bar v. Carr (D. Kay)	70039	9/22/88	Reprimand	
The Florida Bar v. Carr (Paul)	70038	9/22/88	Reprimand	
Travelers Indem. Co. v. Vega	72239	7/19/88	Rev. den.	3d DCA 520 So.2d 73
Waldman v. Waldman	72128	7/13/88	Rev. den.	3d DCA 520 So.2d 87
Walker v. State	72777	7/22/88	App. dism.	5th DCA
Wallace v. State	72719	7/15/88	Rev. dism.	5th DCA 527 So.2d 205
Webb v. Dugger	72224	8/15/88	Hab.Corp. den.	
Weise v. State	72738	7/20/88	Cause dism.	5th DCA 527 So.2d 205
Welleby Condominium Ass'n One, Inc. v. William Lyon Co.	72314	7/19/88	Rev. den.	4th DCA 522 So.2d 35
Williams v. Deren	72241	7/20/88	Rev. den.	5th DCA 521 So.2d 150
Williams v. Dugger	72559	8/26/88	Hab.Corp. den.	
Williams v. State	72680	8/16/88	Hab.Corp. den.	
Williams v. State	72803	8/19/88	App. dism.	1st DCA 520 So.2d 669
Yarris v. State	72450	8/15/88	App. dism.	5th DCA 525 So.2d 900
Zalay v. John Hancock Mut. Life Ins. Co.	72286	7/19/88	Rev. den.	2d DCA 522 So.2d 944

DISTRICT COURTS OF APPEAL

FIRST DISTRICT

Title	Docket Number	* Date	Disposition	** Appeal from and Citation
Boyd v. State	88-59	8/16/88	Aff.	Cir.Ct. (Okaloosa)
Bucci v. State	88-352	8/16/88	Aff.	Cir.Ct. (Escambia)
City of Jacksonville v. Kennedy	87-1698	8/16/88	Aff.	Cir.Ct. (Duval)
Dodd v. Dugger	87-1862	8/16/88	Aff.	Cir.Ct. (Bradford)
Drewery v. State	87-738	9/13/88	Aff.	Cir.Ct. (Alachua)
Dunlap v. Duval Beverage Distributors, Inc.	87-1225	8/16/88	Aff.	Cir.Ct. (Clay)
Dupree v. State	87-2120	7/25/88	Aff.	Cir.Ct. (Duval)
Gonzales v. Raline Camp	87-1299	8/16/88	Aff.	Cir.Ct. (Duval)
Harmon v. State	88-276	9/19/88	Aff.	Cir.Ct. (Duval)

* Date of decision or date rehearing denied (if requested).

** Court or agency rendering decision appealed and citation (if reported).

106 Idaho 855

INVESTORS LIMITED OF SUN VALLEY, a general partnership, Plaintiff-Respondent,

v.

SUN MOUNTAIN CONDOMINIUMS, PHASE I, INC. HOMEOWNERS ASSOCIATION, Defendant-Appellant.

No. 14078.

Court of Appeals of Idaho.

June 26, 1984.

Present developer of condominium project filed suit against condominium association seeking a declaratory judgment holding that developer had voting rights in the association. The District Court, Fifth Judicial District, Blaine County, Douglas D. Kramer, J., determined that developer had voting rights in the association proportional to its share of ownership in the common area of the project, and association appealed. The Court of Appeals, Swanstrom, J., held that language of condominium declaration defining membership rights in the association demonstrated that ownership of entire unimproved and unsold portion of the condominium project did not make developer an "owner" entitled to membership and voting rights in the association.

Reversed.

1. Condominium ⇐3

Declaration which must be filed to create a condominium project is essentially a master deed which defines the rights and duties of the developer, the owners of the individual condominium units, and the management body of the project. I.C. § 55–1505.

2. Condominium ⇐3

Basic tenets of contract law required that condominium declaration be construed in favor of nondrafting party. I.C. § 55–1505.

3. Condominium ⇐6

Condominium Property Act does not prohibit or restrict developer from retaining control over managing body of condominium owners by reason of developer's ownership of built but unsold units. I.C. § 55–1501 et seq.

4. Condominium ⇐8

Language of condominium declaration defining membership rights in condominium association demonstrated that ownership of entire unimproved and unsold portion of condominium project did not make successor in interest to developer of the project an "owner" entitled to membership and voting rights in the association. I.C. § 55–1505.

See publication Words and Phrases for other judicial constructions and definitions.

Lawrence J. Young, Ketchum, for defendant-appellant.

Rand L. Peebles and Edward A. Lawson of Lawson & Peebles, Ketchum, for plaintiff-respondent.

SWANSTROM, Judge.

Investors Limited of Sun Valley (Investors), as the present developer of the Sun Mountain Condominium project, filed suit against Sun Mountain Condominiums Homeowners Association seeking a declaratory judgment holding that it has voting rights in the Association. The Association filed an answer, denying that Investors had any voting rights in the Association. The district court granted Investors' motion for summary judgment and held that it had voting rights in the Association proportional to its share of ownership in the common area of the project. The Association appeals. We reverse.

The issue in this case is whether Investors is the "owner" of platted but *unbuilt* condominium units and is thereby entitled to voting rights in the Association, the "management body" of the condominium project. We hold that Investors is not an owner, but limit our holding to the facts in

this case and base it upon the particular language in the condominium documents.

The facts in this case are not disputed. In 1972 a condominium declaration and plats for the Sun Mountain Condominiums, Phase I, were filed with the Blaine County Recorder. The project, to be built in Ketchum, Idaho, was to consist of three buildings, each containing four units, on a parcel of approximately one acre. The original developer built one of the buildings shown on the plats and sold the first four units to individual purchasers. The remaining two buildings are yet to be built.

In September of 1979, Investors purchased the Sun Mountain project from the original developer. Later, Investors submitted to the City of Ketchum amended plans for the project, showing that three additional buildings would be built on the remaining land, rather than two as shown on the original plats. The Association, consisting of the owners of the four units in the building that had been completed, objected to Investors' new plans which would significantly reduce each owner's share of the common area.

Under Idaho law, prior to the first sale of a condominium, the declaration and the plat or plats may be amended or revoked by a subsequently recorded instrument executed and acknowledged by the record owner and the holder of any recorded security interest in all of the property comprising the condominium project. I.C. § 55–1504. However, after the first sale of a condominium, the declaration and plats can be amended only if the proposed amendment is consented to by the requisite percentage of "the voting power of the owners of the project," always more than fifty percent, as specified in the declaration. I.C. § 55–1505(2)(k). Here the declaration recorded by the declarant in 1972 stated:

> This Declaration shall not be revoked nor shall any of the provisions herein be amended unless the Owners representing an aggregate ownership interest of 85% or more of the Condominiums, as reflected on the real estate records of Blaine County, Idaho ... consent and agree to such revocation or amendment by instruments duly recorded.

It is undisputed that the four owners of the completed condominiums represent an aggregate ownership of thirty-three percent of the total condominiums originally planned and platted for Sun Mountain Condominiums, Phase I. The original developer had never voted in, attempted to control or to manage the Association, nor had it ever been assessed or paid any of the assessments of the Association. The owners of the four completed units comprised the Association and paid one hundred percent of all of its assessments. All four owners opposed Investors' plans to add an additional building to the project. However, to overcome the Association's resistance to its plans, Investors tried to gain control of the Association by asserting its voting rights as the "owner" of eight *unbuilt* condominium units.[1] The Association rejected Investors' claim of voting rights and refused to allow it to participate in Association affairs. Investors then filed this suit.

The increasing popularity of the condominium form of ownership led the Idaho Legislature in 1965 to adopt the Condominium Property Act in order to clarify the concept of "holding property in the condominium estate" and to "permit and facilitate the construction and development of condominiums and condominium projects." I.C. § 55–1502. A condominium project is created once there has been substantial compliance in good faith with the provisions of I.C. § 55–1504. To create a condominium project under that section, several things must occur: (1) a declaration, together with a plat or plats, must be recorded in the county where the project is to be located; (2) the recorded documents must express an intent to create a project subject to the provisions of the Act; and (3) among the documents there must be (i) a

1. The actual number of votes which can be cast by a member of the Association is determined by that member's percentage interest in the common area, as shown by an exhibit filed with the condominium declaration. This percentage interest can vary from unit to unit.

plat or map of the project; (ii) diagrammatic floor plans of the building or buildings; and (iii) a certificate executed and acknowledged by the record owner of the project consenting to the recordation of the documents.

[1] The declaration which must be filed to create a condominium project is essentially a master deed which defines the rights and duties of the developer, the owners of the individual condominium units and the management body of the project. Idaho Code § 55–1505 specifies what must be included in the condominium declaration: (1) a legal description of the land within the project; (2) a legal description of each unit in the project; and (3) the percentage of ownership interest in the common area to be allocated to each unit for the purpose of tax assessment. It is not disputed that the documents for creation of Sun Mountain Condominiums, Phase I, filed with the Blaine County Recorder in 1972, created a condominium project as defined and governed by the Condominium Property Act.

Section 8.1 of the Sun Mountain Condominium Declaration designates the Association as the "management body" of the condominium project. The remaining sections of Article VIII of the declaration set forth the duties and rights of the Association. Among other things, the Association is given responsibility for management and control of the common area, maintenance and repair of the buildings, and landscaping. The Association has the right to obtain professional services to help carry out its duties and it has the authority to make reasonable rules to govern the use of the units and the common area.

A key provision of the declaration is section 7.1 which states: "Every Owner shall be entitled and required to be a member of the Association .... No person or entity other than an Owner may be a member of the Association." Investors contends that, as the record owner of the entire unimproved and unsold portion of the project, it is an "owner" and is entitled to membership in the Association. The Association contends, on the other hand, that the term "owner" refers only to the owners of condominium units which have been built and are physically extant.

Investors, at oral argument, contended this project was to be developed in stages, indicating an intent that the term "owner" should apply to all platted condominiums, whether built or unbuilt. Arguably, the use of the term "Phase I" implies that other phases could follow, but that argument invites us to speculate on things outside the record. This we will not do. The record before us indicates that all three buildings platted in Phase I of the project were to be built and offered for sale at the same time. This is reflected in several parts of the recorded declaration.

[2] As explained below, we think the term "owner," as used in the declaration, is unambiguous. A plain reading of the declaration supports the Association's position that "owner" is defined by reference to physically existing units. However, we note at the outset that even if the definition were susceptible of differing interpretations, in this instance we would reach the same result. Investors' predecessor was the "declarant" who prepared and filed the condominium declaration in 1972. The predecessor chose the language used in the declaration to define membership rights and voting rights in the Association. The declarant could easily have made clear, specific provisions in the declaration for retaining some control in the Association until all or part of the units were completed and sold, if this was the intent. Because the declaration was drafted by Investor's predecessor in interest, the basic tenets of contract law require that we construe the provisions of the document in favor of the nondrafting party. *See Hillside Service Co. v. Alcorn*, 105 Idaho 792, 673 P.2d 392 (1983) (construing terms used in a "Declaration of Restrictive Covenants"); and *Council of Unit Owners of Pilot Point Condominium v. Realty Growth Investors*, 436 A.2d 1268 (Del.Ch.1981) (construing language of a recorded condominium declaration).

[3] Moreover, the condominium statutes do not require any deviation from a plain reading of the declaration. The Condominium Property Act (1965 Idaho Sess.Laws, chapter 225, p. 515) is a "first generation" act that is yet to be amended. Unlike many modern statutes governing development and sales of condominiums, the Idaho law does not prohibit or restrict the developer from retaining control over the managing body of condominium owners by reason of the developer's ownership of built but unsold units. The Idaho act is simply silent on the subject. *Compare, e.g.*, Fla. Stat. §§ 718.301, 302 (1981). *See also* P.J. ROHAN, THE "MODEL CONDOMINIUM CODE"—A BLUEPRINT FOR MODERNIZING CONDOMINIUM LEGISLATION, 78 COLUM.L.REV. 587–608 (1978). On the other hand, there is nothing in the Idaho act that suggests the term "owner" as defined in the declaration here should be construed to include ownership of unbuilt units.

[4] We now focus upon the declaration itself. Section 2.7 defines "owner" as "any person or entity, including Declarant, at any time owning a condominium." Condominium is defined by the declaration as follows:

> "Condominium" means a separate interest in a Unit together with an undivided interest in common in the Common Area (expressed as a percentage of the entire ownership interest in the Common Area) as set forth in Exhibit B attached hereto and by this reference made a part hereof.

A unit is defined more specifically in section 2.2 of the declaration as follows, in part:

> "Unit" means the separate interest in a condominium as bounded by the interior surface of the perimeter walls, floors, ceilings, windows and doors thereof and the interior surfaces of the built-in fireplaces as shown and numbered on the condominium map to be filed for record, together with all fixtures and improvements therein contained.

Section 1.4 of the declaration recites: "This condominium project will provide a means for ownership in fee simple of separate interests in Units and for co-ownership with others, as tenants in common, of Common Area, as those terms are herein defined." Section 4.1 recites

> The project is hereby divided into Condominiums, each consisting of a separate interest in a Unit and an undivided interest in common in the Common Area in accordance with the attached Exhibits A & B setting forth the Common Area appurtenant to each Unit. The percentage of ownership interest in the Common Area which is to be allocated to each Unit for purposes of tax assessment under Section 55–1514 of the Idaho Code and for purposes of liability as provided by Section 55–1515 of such Code shall be the same as set forth in Exhibit B. Exhibit B also contains a legal description of each Unit in Building [blank] consisting of the identifying number of such Unit as shown on the Condominium Map. Such undivided interests in the Common Area are hereby declared to be appurtenant to the respective Units.

According to section 2.4, "Building means one of the buildings constructed on the Real Property pursuant to this Declaration, excepting all automobile parking structures."

Sections 4.4 and 4.5 state:

> Title to a Condominium may be held or owned by any entity and in any manner in which title to any other real property may be held or owned in the State of Idaho.
>
> No part of a Condominium or of the legal rights comprising ownership of a Condominium may be separated from any other part thereof during the period of Condominium Ownership prescribed herein, so that each Unit and the undivided interest in the Common Area appurtenant to such Unit shall always be conveyed, devised, encumbered, and otherwise affected only as a complete Condominium. Every gift, devise, bequest, transfer, encumbrance, conveyance or other disposition of a Condominium or any part thereof shall be presumed to be a gift, devise, bequest,

transfer, encumbrance, or conveyance, respectively, of the entire Condominium; together with all appurtenant rights created by law or by this Declaration.

It is clear from the foregoing provisions that to be an "owner"—and thus a member of the Association—one must own a condominium. A condominium does not exist under this declaration unless there is *both* ownership of a separate interest in real property (a unit) and an undivided interest in real property (the common area of the project). A developer, like anyone else, must have both interests before he is a "owner" within the meaning of the declaration. The declaration treats a "unit" as part of a "building" and refers to "building," in section 2.4, as one of the buildings *constructed* on the property.

We do not question that Investors is a "record owner" of the property committed to the Sun Mountain Condominiums, Phase I project who has a "real property" interest in that project. I.C. § 55–1505. Likewise, in construing the term "owner" as used in this declaration, we are not suggesting that either a developer or a purchaser of an unbuilt condominium has no recognizable real property interest in a unit. That question is not before us. It may well be that, in spite of historic and long-standing prohibitions to the contrary, a developer can enter into valid contracts to sell "future interests" in unbuilt condominiums once statutory requirements for filing declarations, plats and other documents have been met. *See, e.g., State Savings & Loan Association v. Kauaian Development Company, Inc.*, 50 Hawaii 540, 445 P.2d 109 (1968), *modified in appeal taken after remand*, 62 Hawaii 188, 613 P.2d 1315 (1980). Recognition of this concept implies that contract purchasers of planned but unbuilt condominiums can acquire equitable ownerships of a real property interest in the "property" as defined by I.C. § 55–1503(c). The district judge here indicated his awareness of the public policy stated in the Condominium Property Act "to permit and facilitate the construction and development of condominiums and condominium projects, together with the financing of the same." I.C. § 55–1502. He expressed the view that practical considerations in condominium development, financing and sales require courts to willingly accept and clearly define this "new" form of property ownership. He stated that "common practice in the selling of condominiums necessitates a finding that parties do own condominiums before they are built." We are not challenging that statement here. We are not called upon to determine the broad range of ownership rights. We are simply construing the language employed in this particular declaration, which defines membership rights in the Association.

We conclude that because Investors is not an "owner" of a condominium it is not entitled to membership in the Association. Accordingly, we reverse the summary judgment order and remand for further proceedings.

Costs to appellant. No attorney fees awarded on appeal.

WALTERS, C.J., and BURNETT, J., concur.

106 Idaho 859

Swan Falls Land & Cattle Co., Inc., an Idaho corporation, for dissolution.

Rachel GILLINGHAM, Petitioner-Respondent,

v.

SWAN FALLS LAND & CATTLE CO., INC., an Idaho corporation, and Victoria H. Smith, Respondents-Appellants.

Nos. 14255, 14637.

Court of Appeals of Idaho.

June 26, 1984.

Appeals were taken from orders of the District Court, Fourth Judicial District,